REPORTS

OF

Cases Argued and Determined

IN THE

COURT of CLAIMS

OF THE

STATE OF ILLINOIS

VOLUME 7

Containing cases in which Opinions were filed between
July 1, 1931 and June 30, 1933

SPRINGFIELD, ILLINOIS
1933

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PREFACE

The opinions of the Court of Claims herein reported are published by authority of the provisions of Section 9 of an Act entitled, "An Act to create the Court of Claims and to prescribe its powers and duties," approved June 25, 1917, in force July 1, 1917.

EDWARD J. HUGHES,

Secretary of State
and Ex-officio Secretary Court of Claims.

JUSTICES OF THE COURT OF CLAIMS

C. N. HOLLEBICH, *Chief Justice,*

C. H. LINSCOTT, *Judge,*

A. L. YANTIS, *Judge.*

OTTO KERNER, *Attorney General.*

EDWARD J. HUGHES, *Secretary of State and Ex-officio Secretary of the Court.*

RULES OF THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

TERMS OF COURT.

RULE 1. (a) The Court of Claims shall hold a regular session of the Court at the Capitol of the State on the second Tuesday of January, March, May, September and November of each year, and such special sessions as it deems necessary or proper to expedite the business of the Court.

(b) No cause will be heard at any session unless the pleadings have been settled and the evidence, abstracts, briefs and arguments of both parties have all been filed with the Clerk on or before the first day of said session.

COMPLAINT.

RULE 2. (a) Causes shall be commenced by a verified complaint which, together with four copies thereof, shall be filed with the Clerk of the Court. The party filing a claim shall be designated as the claimant and the State of Illinois shall be designated as the respondent. The original complaint and all copies thereof shall be provided with a suitable cover or back having printed or plainly written thereon the title of the Court and cause, together with the name and address of all attorneys representing the claimant. The Clerk will note on the complaint and each copy the date of filing and deliver one of said copies to the Attorney General.

(b) No person who is not a licensed attorney and an attorney of record in said cause will be permitted to appear for or on behalf of any claimant, but a claimant even though not a licensed attorney, may prosecute his own claim in person.

RULE 3. Such complaint shall be printed or typewritten and shall be captioned substantially as follows:

IN THE COURT OF CLAIMS OF THE STATE OF ILLINOIS.

A. B.,
Claimant
vs.
STATE OF ILLINOIS
Respondent
} No.

RULE 4. (a) Such complaint shall state concisely the facts upon which the claim is based and shall set forth the address of the claimant,

the time, place, amount claimed, the State department or agency in which the cause of action originated and all averments of fact necessary to state a cause of action at law or in equity.

(b) If the claimant bases his complaint upon a contract or other instrument in writing a copy thereof shall be attached thereto for reference.

RULE 5. (a) The claimant shall state whether or not his claim has been presented to any State department or officer thereof, or to any person, corporation or tribunal, and if so presented, he shall state when, to whom, and what action was taken thereon; and, he shall further state whether or not he has received any payment on account of such claim and, if so, the amount so received.

(b) The claimant shall also state whether or not any third person or corporation has any interest in his claim, and if any such person or corporation has an interest therein the claimant shall state the name and address of the person or corporation having such interest, the nature thereof, and how and when the same was acquired.

RULE 6. (a) A bill of particulars, stating in detail each item and the amount claimed on account thereof, shall be attached to the complaint in all cases.

(b) Where the claim is based upon the Workmen's Compensation Act the claimant shall set forth in the complaint all payments, both of compensation and salary, which have been received by him or by others on his behalf since the date of said injury; and shall also set forth in separate items the amount incurred, and the amount paid for medical, surgical and hospital attention on account of his injury, and the portion thereof, if any, which was furnished or paid for by the respondent.

RULE 7. No complaint shall be filed by the Clerk unless verified under oath by the claimant, or by some other person having personal knowledge of the facts contained therein.

RULE 8. If the claimant be an executor, administrator, guardian or other representative appointed by a judicial tribunal, a duly authenticated copy of the record of appointment must be filed with the complaint.

RULE 9. If the claimant die pending the suit his death may be suggested on the record, and his legal representative, on filing a duly authenticated copy of the record of his appointment as executor or administrator, may be admitted to prosecute the suit by special leave of the Court. It is the duty of the claimant's attorney to suggest the death of the claimant when that fact first becomes known to him.

RULE 10. Where any claim has been referred to the Court by the Governor or either House of the General Assembly and party interested therein may file a verified complaint at any time prior to the next regular session of the Court. If no such person files a complaint, as aforesaid, the Court may determine the cause upon whatever evidence it shall have before it, and if no evidence has been presented in support of such claim, the cause may be stricken from the docket with or without leave to reinstate, in the discretion of the Court.

RULE 11. If it appears on the face of a complaint that the claim is barred by a statute of limitations, the same shall be dismissed.

PLEADINGS.

RULE 12. Pleadings and practice at common law as modified by the Civil Practice Act of Illinois shall be followed except as herein otherwise provided.

RULE 13. The original and four copies of all pleadings shall be filed with the Clerk and the original shall be provided with a suitable cover, bearing the title of the Court and cause, together with a proper designation of the pleading printed or plainly written thereon.

RULE 14. A claimant desiring to amend his complaint or to introduce new parties may do so at any time before he has closed his testimony, without special leave, by filing five copies of an amended complaint, but any such amendment or the right to introduce new parties shall be subject to the objection of the respondent, made before or at final hearing. Any amendments made subsequent to the time the claimant has closed his testimony must be by leave of Court.

RULE 15. The respondent shall answer within sixty days after the filing of the complaint, and the claimant shall reply within thirty days after the filing of said answer, unless the time for pleading be extended; *provided,* that if the respondent shall fail to so answer a general traverse or denial of the facts set forth in the complaint shall be considered as filed.

EVIDENCE.

RULE 16. After the cause is at issue the parties shall present evidence either by a stipulation of fact duly entered or by a transcript of evidence taken at such time and place as is mutually agreeable and convenient to the parties concerned. All witnesses before testifying shall be duly sworn on oath by a notary public or other officer authorized to administer oaths. If the parties are unable to agree upon a time and/or place of such hearing, application may be made to any Judge of the Court, who shall thereupon fix a time and place for such hearing.

RULE 17. All evidence shall be taken in writing in the manner in which depositions in chancery are usually taken. All evidence when taken and completed by either party shall be filed with the Clerk on or before the first day of the next succeeding regular session of the Court.

RULE 18. All costs and expenses of taking evidence on behalf of the claimant shall be borne by the claimant, and the costs and expenses of taking evidence on behalf of the respondent shall be borne by the respondent.

RULE 19. If the claimant fails to file the evidence in his behalf as herein required, the Court may, in its discretion, fix a further time within which the same shall be filed and if not filed within such further time the cause may be dismissed. Upon motion of the Attorney General the Court may, in its discretion, extend the time within which evidence on behalf of the respondent shall be filed.

RULE 20. If the claimant has filed his evidence in apt time and has otherwise complied with the rules of the Court, he shall not be prejudiced by the failure of the respondent to file evidence in its behalf

in apt time, but a hearing by the Court may be had upon the evidence filed by the claimant, unless for good cause shown, additional time to file evidence be granted to the respondent.

RULE 21. All records and files maintained in the regular course of business by any State department, commission, board or agency of the respondent and all departmental reports made by any officer thereof relating to any matter or cause pending before the Court shall be *prima facie* evidence of the facts set forth therein; *provided*, a copy thereof shall have been first duly mailed or delivered by the Attorney General to the claimant or his attorney of record.

ABSTRACTS AND BRIEFS.

RULE 22. The claimant, in all cases where the transcript of evidence exceeds fifteen pages in number, shall furnish a complete typewritten or printed abstract of the evidence, referring to the pages of the transcript by numerals on the margin of the abstract. The evidence shall be condensed in narrative form in the abstract so as to present clearly and concisely its substance. The abstract must be sufficient to present fully all material facts contained in the transcript and it will be taken to be accurate and sufficient for a full understanding of such facts, unless the respondent shall file a further abstract, making necessary corrections or additions.

RULE 23. When the transcript of evidence does not exceed fifteen pages in number the claimant may file the original and four copies of such transcript in lieu of typewritten or printed abstracts of the evidence, otherwise the original and four copies of an abstract of evidence shall be filed with the Clerk. The original shall be provided with a suitable cover, bearing the title of the Court and cause, together with the name and address of the attorney filing same printed or plainly written thereon.

RULE 24. Each party may file with the Clerk the original and four copies of a typewritten or printed brief setting forth the points of law upon which reliance is had, with reference made to the authorities sustaining their contentions. Accompanying such briefs there may be a statement of the facts and an argument in support of such briefs. The original shall be provided with a suitable cover, bearing the title of the Court and cause, together with the name and address of the attorney filing same printed or plainly written thereon. Either party may waive the filing of his brief and argument by filing with the Clerk a written notice in duplicate to that effect.

RULE 25. The abstract, brief and argument of the claimant must be filed with the Clerk on or before thirty days prior to the first day of the session to which the cause shall stand for hearing, unless the time for filing the same is extended by the Court or one of the Judges thereof. The respondent shall file its brief and argument not later than the first day of said session, unless the time for filing the brief of claimant has been extended, in which case the respondent shall have a similar extention of time within which to file its brief. Upon good cause shown

further time to file abstract, brief and argument or a reply brief of either party may be granted by the Court or by any Judge thereof.

RULE 26. If a claimant shall fail to file either abstracts or briefs within the time prescribed by the rules, the Court may enter a rule upon him to show cause by a day certain why his claim should not be dismissed. Upon the claimant's failure to comply with such rule, the cause may be dismissed or the Court may, in its discretion, either extend the time for filing abstracts or briefs, or pass or continue the cause for the term, or determine the same upon the evidence before it.

RULE 27. If the claimant has filed abstracts and briefs, as herein provided, in apt time, and has otherwise complied with the rules, he shall not be prejudiced by the failure of the respondent to file abstracts or briefs on time, unless the time for the filing of abstracts or briefs by the respondent be extended.

EXTENSION OF TIME.

RULE 28. Where by these rules it is provided the time may be extended for the filing of pleadings, abstracts or briefs, either party, upon notice to the other, may make application for an extension of time to any judge of this Court, who may enter an order thereon, transmitting such order to the Clerk, and the Clerk shall thereupon place the same of record as an order of the Court.

MOTIONS.

RULE 29. Each party shall file with the Clerk the original and four copies of all motions presented. The original shall be provided with a suitable cover, bearing the title of the court and cause, together with the name and address of the attorney filing same printed or plainly written thereon.

RULE 30. Motions shall be filed with the Clerk at least five days before they are presented to the Court. All motions will be presented by the Clerk immediately after the daily announcement of the court but at no other time during the day, unless in case of necessity, or in relation to a cause when called in course. All motions and suggestions in support thereof shall be in writing, and when the motion is based on matter that does not appear of record, it shall be supported by affidavit.

RULE 31. In case a motion to dismiss is denied, the respondent shall plead within thirty days thereafter, and if a motion to dismiss be sustained, the claimant shall have thirty days thereafter within which to amend his complaint; and, if he decline or fail to so amend, final judgment will be entered dismissing the claim.

ORAL ARGUMENTS.

RULE 32. Either party desiring to make oral arguments shall file a notice of his intention to do so with the Clerk at least ten days before the session of the Court at which he wishes to make such argument.

REHEARING.

RULE 33. A party desiring a rehearing in any cause shall, within thirty days after the filing of the opinion, file with the Clerk the original and four copies of his petition for rehearing. The petition shall state briefly the points supposed to have been overlooked or misapprehended by the Court with proper reference to the particular portion of the original brief relied upon and with authorities and suggestions concisely stated in support of the points. Any petition violating this rule will be stricken.

RULE 34. When a rehearing is granted the original briefs of the parties and the petition for rehearing, answer and reply thereto shall stand as files in the case on rehearing. The opposite party shall have twenty days from the granting of the rehearing to answer the petition and the petitioner shall have ten days thereafter within which to file his reply. Neither the claimant nor the respondent shall be permitted to file more than one application or petition for a rehearing.

RECORDS AND CALENDAR.

RULE 35. The Clerk shall record all orders of the Court, including the final disposition of causes. He shall keep a docket in which he shall enter all claims filed, together with their number, date of filing, the name of claimants, their attorneys of record and respective addresses. As papers are received by the Clerk, in course, he shall stamp the filing date thereon and forthwith mail to opposing counsel a copy of all orders entered, pleadings, motions, notices and briefs as filed; such mailing shall constitute due notice and service thereof. Within ten days prior to the first day of each session of the Court the Clerk shall prepare a calendar of the causes to be disposed of at such session and deliver a copy thereof to each of the Judges and to the Attorney General.

RULE 36. Whenever on peremptory call of the docket any claim or claims appear in which no positive action has been taken and no attempt made in good faith to obtain a decision or hearing of the same within two years, the Court may, on its own motion, enter an order therein ruling the claimant to show cause on or before the first day of the next succeeding regular session why such claim or claims should not be dismissed for want of prosecution and stricken from the docket. Upon the claimant's failure to take some affirmative action to discharge or comply with said rule, prior to the first day of the next regular session after the entry of such order, such claim or claims may be dismissed and stricken from the docket with or without leave to reinstate on good cause shown. On application and a proper showing made by the claimant the Court may, in its discretion, grant an extension of time under such rule to show cause. The fact that any case has been continued or leave given to amend or that any motion or matter has not been ruled upon will not alone be sufficient to defeat the operation of this rule. And the Court may, during the second day of any regular session, call its docket for the purpose of disposing of cases under this rule.

ORDER OF THE COURT.

It is hereby ordered that the above and foregoing rules be and the same are hereby adopted as the rules of the Court of Claims of the State of Illinois. It is further ordered that such rules shall be in full force and effect from and after the first day of January, A. D. 1934, and that the same shall be in lieu of all rules theretofore in force.

Entered this 22nd day of November, A. D. 1933.

C. N. HOLLERICH, *Chief Justice.*
C. H. LINSCOTT, *Judge.*
AUBREY L. YANTIS, *Judge.*

COURT OF CLAIMS LAW

An Act to create the Court of Claims and to prescribe its powers and duties. (Approved June 25, 1917, L. 1917, p. 325.)

COURT OF CLAIMS CREATED.] SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* The Court of Claims is hereby created. It shall consist of a chief justice and two judges, appointed by the Governor by and with the advice and consent of the Senate. In any case of vacancy in such office during the recess of the Senate, the Governor shall make a temporary appointment until the next meeting of the Senate, when he shall nominate some person to fill such office; and any person so nominated, who is confirmed by the Senate, shall hold his office during the remainder of the term and until his successor is appointed and qualified. If the Senate is not in session at the time this act takes effect, the Governor shall make a temporary appointment as in case of a vacancy.

APPOINTMENT OF MEMBERS—TERMS OF OFFICE.] § 2. The term of office of the chief justice and of each judge shall be from the time of his appointment until the second Monday in January next succeeding the election of a Governor, and until his successor is appointed and qualified. This provision in reference to the term of office of the chief justice and of each judge shall apply to the current terms of said offices and the respective terms of the present incumbents shall be deemed to have begun upon the appointment of said incumbents. (As amended by act approved and in force May 11, 1927. L. 1927, p. 393.)

EMERGENCY.] § 3. WHEREAS, in order that the full salary of said chief justice and of said judges as provided for by an act of the 54th General Assembly may be paid out of an appropriation made and now available therefor; therefore, an emergency exists and this act shall take effect and be in force and effect from and after its passage and approval. (Act approved May 11, 1927. L. 1927, p. 393.)

OATH.] § 3. Before entering upon the duties of the office of the chief justice and each judge shall take and subscribe the constitutional oath of office, which shall be filed in the office of the Secretary of State.

SALARY.] § 4. The chief justice and each justice shall each receive a salary of three thousand two hundred dollars per annum, payable in equal monthly installments. (As amended by L. 1925, p. 329, June 30, July 1; L. 1933, p. 452, approved July 8.)

SECRETARY OF STATE, SECRETARY OF THE COURT.] § 5. The Secretary of State shall be *ex officio* secretary of the Court of Claims. He shall provide the court with a suitable place in the Capitol building in which to transact its business.

POWERS AND DUTIES.] § 6. The Court of Claims shall have power:

(1) To make rules and orders, not inconsistent with law, for carrying out the duties imposed upon it by law;

(2) To make rules governing the practice and procedure before the court, which shall be as simple, expeditous and inexpensive as reasonably may be;

(3) To compel the attendance of witnesses before it, or before any notary public or any commissioner appointed by it, and the production of any books, records, papers or documents that may be material or relevant as evidence in any matter pending before it;

(4) To hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, *ex contractu* and *ex delicto*, which the state, as a sovereign commonwealth, should, in equity and good conscience discharge and pay;

(5) To hear and give its opinion on any controverted questions of claims or demand referred to it by any officer, department, institution, board, arm or agency of the state government and to report its findings and conclusions to the authority by which it was transmitted for its guidance and action;

(6) To hear and determine the liability of the state for accidental injuries or death suffered in the course of employment by any employee of the state, such determination to be made in accordance with the rules prescribed in the act commonly called the "Workmen's Compensation Act," the Industrial Commission being hereby relieved of any duty relative thereto.

SUBPOENA—CONTEMPT.] § 7. In case any person refuses to comply with any subpoena issued in the name of the chief justice, attested by the Secretary of State, with the seal of the state attached, and served upon the person named therein as a summons at common law is served, the circuit court of the proper county, on application of the secretary of the court, shall compel obedience by attachment proceedings, as for contempt, as in a case of a disobedience of the requirements of a subpoena from such court on a refusal to testify therein.

DECISIONS.] § 8. The concurrence of two members of the court shall be necessary to the decision of any case.

FILE REPORT OF FINDINGS.] § 9. The court shall file a brief written statement of the reasons for its determination in each case. In case the court shall allow a claim, or any part thereof, which it has the power to hear and determine, it shall make and file an award in favor of the claimant finding the amount due from the State of Illinois. Annually the Secretary of the court shall compile and publish the opinions of the court.

CLAIMS—TIME OF FILING.] § 10. Every claim against the state, cognizable by the Court of Claims, shall be forever barred unless the claim is filed with the secretary of the court within five years after the claim first accrues, saving to infants, idiots, lunatics, insane persons and persons under disability at the time the claim accrued two years from the time the disability is removed.

ATTORNEY TO APPEAR FOR STATE.] § 11. The Attorney General shall appear for and represent the interests of the State in all matters before the court.

JURISDICTION—PENDING CLAIMS.] § 12. All claims now pending in the Court of Claims created under "An Act to create the Court of Claims and prescribe its powers and duties," approved May 16, 1903, in force July 1, 1903, shall be heard and determined by the Court of Claims created by this act in accordance with the provisions hereof.

JURISDICTION EXCLUSIVE.] §13. The Jurisdiction conferred upon the Court of Claims by this Act shall be exclusive. No appropriation shall hereafter be made by the General Assembly to pay any claim or demand, over which the Court of Claims is hereby given jurisdiction, unless an award therefor shall have been made by the court of claims.

§ 14. Repeal.

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CASES ARGUED AND DETERMINED IN THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

(No. 1539—Claim denied.)

EDWARD EGAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 8, 1931.

PERSONAL INJURY—*when no award will be made.* The State is not liable for the negligence of its agents and servants.

SAME—*negligence.* Where the injury complained of appears to have resulted from the negligence of another, an award will be denied.

Per Curiam:

It appears that claimant suffered an accident on the morning of Saturday, August 3, 1929. The accident occurred about two miles west of Elgin, Illinois. It further appears that a convoy of seven National Guard Army Trucks were going westerly from Chicago to Camp Grant near Rockford, Illinois. The claimant with one William Hornbeck of Chicago who owned and operated a freight truck with semi-trailer attached was proceeding easterly carrying a heavy load of freight. The claimant was riding in the right front seat. It appears that the Hornbeck truck was going at quite a rapid rate of speed and that the Government trucks were running very slow.

From all the evidence in this case this court is of the opinion that if due care was exercised by the driver of the truck and trailer in which claimant was riding any accident could be avoided and if there is any claim that the claimant herein would be against the owner and driver of the truck in which he was riding.

The Attorney General comes and raises the well established rule of law that the doctrine of *respondent superior* does not apply to a State in the exercise of purely Govern-

mental functions. This is a rule that has been followed by the Court of Claims and conceded to be the law.

Taking this rule into consideration and the probable negligence of the driver and owner of the truck in which claimant was riding the court is of the opinion that this claim is without merit. Therefore, the claim is disallowed.

(No. 1544—Claim denied.)

FRANK McCANN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 8, 1931.

PERSONAL INJURY—*when award will be denied for personal injury sustained on State Highway.* Where the evidence shows that claimant was familiar with a highway and the condition thereof and fails to observe warning signs as to condition of same, no award will be made for personal injuries sustained while traveling thereon, alleged to have been caused by bad condition thereof.

SAME—*negligence of State employees.* The State is not liable for the negligence of its officers, agents or servants.

Per Curiam:

This is a claim based upon an injury sustained by claimant while riding with his friend about six or seven miles east of St. Charles, at which point there was a gap in the pavement on account of the construction of an overhead crossing. There was detour about one-half mile long and it appears that the driver of the car, companion and friend of claimant, turned suddenly upon the detour and the driver lost control of the machine and the car went into a shallow ditch turning upside down and the claimant was injured considerably.

The Attorney General comes and presents the rule of the doctrine of *respondent superior*. There can be no question as to this rule which does not apply to the State in the exercise of purely Governmental functions.

However, it appears that the claimant and driver were acquainted with this road and the detour, having passed over same several times, could have observed the detour sign posts and that they had ample opportunity to know the possible danger in making the detour and therefore assumed the risk that they encountered.

Therefore, the court recommends that claim be disallowed.

(No. 1588—Claim denied.)

DAWSON MCCULLEY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 8, 1931.

DAWSON MCCULLEY, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*when State not liable for.* The State is not liable for the negligence of its officers, agents and servants.

DISMISSAL—*when case may be dismissed for failure to conform to rules of court.* When declaration does not conform to rules of court and is not sworn to by the claimant case may be dismissed.

MR. JUSTICE THOMAS delivered the opinion of the court:

This is a claim for $59.20 damages to the automobile of the claimant which he alleges was caused by a collision with a snowplow being operated by one of the employees of the State Highway Department on the evening of January 18, 1930. The declaration does not conform to the rules of the court and is not sworn to by the claimant as the rules provide and we would be justified in dismissing it for that reason; but we have carefully examined the evidence in the case and have reached the conclusion that the claimant is not entitled to an award. There is no evidence that the driver of the snowplow was guilty of any negligence but if he was the State is not liable for any injury caused by his negligence, it being fundamental that the State is not liable for the negligence of its officers, agents, and servants. The claim is therefore denied and the cause dismissed.

(Nos. 1605-1606—Claims dismissed.)

Opinion filed September 8, 1931.

GOODRICH SILVERTOWN, INC., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

DISMISSAL—*when case will be dismissed.* Where it appears claim has been paid the case will be dismissed.

Per Curiam:

These two claims are for bills sold to the State by claimant aggregating in value $33.30. Since the claims were filed in

this court they have been paid by the Department of Conservation, and as the cause of action has been satisfied they are dismissed.

(Nos. 1611-1612—Consolidated—Claims denied.)

TONY A. FENOGLIO, No. 1611 AND JAMES FLETCHER, No. 1612, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 8, 1931.

T. W. RENNICK AND LOUIS A. ZEARING, for claimants.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*property damage-negligence.* Where it appears from the evidence that claimants sustained injuries complained of without any negligence or fault on the part of the agents of the State an award will be denied.

SAME—*contributory negligence.* Where the evidence shows claimants were guilty of contributory negligence recovery will be barred.

Mr. JUSTICE THOMAS delivered the opinion of the court:

As the facts upon which these two claims are based are identical the claims have been consolidated for hearing and decision. On the night of February 17, 1930 claimants were driving along State Highway No. 7, near the Village of DePue, in an automobile belonging to claimant, Fletcher. The night was very foggy and the pavement was slippery with ice. The fog was so dense that claimants could not see far ahead of their car, and the pavement was so icy that the employees of the Highway Department were spreading cinders on the hillsides and curves of the road, the cinders being hauled in a truck driven by Henry Morris. Near 12 o'clock at night, while the truck was being driven along the highway from one point where cinders were being spread to another, claimants ran into it from the rear and the automobile of Mr. Fletcher was seriously damaged by the collision, Mr. Fletcher himself more or less injured and claimant Fenoglio somewhat bruised and his clothing damaged. Mr. Fletcher is asking damages in the sum of $1,500.00 and Mr. Fenoglio in the sum of $100.00.

The evidence is conflicting as to the speed which claimants were driving, they saying they were driving 20 to 22 miles per hour, while the employees of the State testify they were

driving much faster than that. The truck had a red rear light, a red lantern on the rear of the cab, a white light on the side and its head lights all burning before and at the time of the collision and was being driven between five and ten miles per hour.

Claimants suits are based on the theory that the injuries to them and their car were caused by the negligence of the employees of the State. The State is never liable for damages caused by the negligence of its officers, employees or agents. This rule of law has been so repeatedly announced by this and other courts that citation of authorities is not deemed necessary. In view of this established rule the State is not liable for the damages claimed even though they might have been caused by the negligence of its employees.

It is fundamental that before one can recover in an action of this kind two things must appear—the party causing the injury must have been guilty of negligence and the party injured must have been free from negligence. In this case the evidence clearly shows that the employees of the State were not guilty of negligence and that the injuries were not caused by any wrongful act of theirs. The proof further shows that had the claimants been using that care and caution which the conditions of the road and weather required of them at the time the collision would not have happened.

They are therefore not entitled to any award against the State in any view of the case. The claims are denied and the cases dismissed.

(No. 1622—Claim dismissed.)

FETTES, LOVE & SIEBEN, INC., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 8, 1931.

DISMISSAL—*when case will be dismissed upon stipulation of parties.* Upon stipulation of the parties, because of action satisfied, the case will be dismissed.

Per Curiam:

Counsel for the claimant and the Attorney General have filed a stipulation in this cause that it shall be dismissed without costs, all costs having been paid. It is therefore ordered that the cause be and the same is hereby dismissed.

(No. 1623—Claimant awarded $200.00.)

THE CAIRO WATER COMPANY, a corporation, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 8, 1931.

FRANCHISE TAX—PAYMENT MADE UNDER MUTUAL MISTAKE OF FACT—*when award will be made.* Where corporation files an amendment to its charter, providing for exchange of its capital stock, which amendment was through mistake construed by Secretary of State as an increase of capital stock and claimant pays increased assessment, an award may be made upon the ground that payment was result of mutual mistake of fact.

Per Curiam:

It appears that claimant filed a certificate of amendment in the Secretary of State's office which certificate was construed by the Secretary of State to be an increase of the capitalization of claimant and claimant asserts that this amendment did not increase the capitalization but merely provided for an exchange of the capital stock. Claimant paid increased assessment for two years which claimant asserts is $100.00 per year more than should be collected. There is no contention on the part of the Attorney General or the Secretary of State that such collection was not made on account of error. It would appear to this court that this case grows out of a mutual mistake of facts and in view of all the facts and circumstances disclosed in the record the court recommends that the claimant be allowed the sum of Two Hundred ($200.00) Dollars.

(No. 1658—Claim denied.)

JOHN STUART COONLEY, JR. AND FRANK A. REHM, EXECUTORS OF THE LAST WILL AND TESTAMENT OF PHOEBE SEIPP, Deceased, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 8, 1931.

Rehearing denied November 4, 1931.

RUBENS, FISCHER, MOSSER & BARNUM, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

INHERITANCE TAX—*when award will be denied for amount claimed to have been erroneously paid.* Where inheritance tax is paid to State Treasurer and application for refund of part thereof, alleged to be in excess of that due is afterward made to State Treasurer, which is denied, Court of Claims is without jurisdiction to make award.

SAME—*State Treasurer.* Inheritance Tax Act is a complete code and the only provision it contains for refund of tax erroneously paid is Section 10, making it the duty of State Treasurer to refund any part of tax erroneously paid, if application therefore is made within two years, but this section also clothes State Treasurer with power to determine from proofs submitted whether or not payments were erroneous.

COURT OF CLAIMS—*jurisdiction.* Where the legislature has seen fit to give an officer of the State Government power to act and decide upon a question, Court of Claims has no jurisdiction to review the decision.

Mr. JUSTICE THOMAS delivered the opinion of the court:

This claim is for the refund of $1,161.05 inheritance taxes alleged to have been erroneously paid because of a mutual mistake of fact. The tax was paid by the executors of Phoebe Seipp, deceased. The facts have been stipulated, the stipulation showing: that Phoebe Seipp died October 28, 1927; that an appraiser was appointed to appraise the property of her estate; that on May 3, 1928, the County Court of Cook County entered an order fixing the amount of inheritance tax due at the sum of $57,761.06; that on April 27, 1928, the executors paid the County Treasurer of Cook County $54,873.01, being the amount of the tax fixed by the County Court less 5% discount; that among the assets of the estate were 240 shares of the preferred stock of the Denver and Rio Grande Railroad Company which were valued by the appraiser at $12,420.00 and that $1,161.05 of the tax paid was tax upon that stock; that on March 19, 1929, the executors for the first time discovered that stock was worthless; that the value of the stock was given to the executors by a broker who mistakenly gave them the value of the stock of the Denver and Rio Grande Western Railroad Company, a solvent corporation, instead of the stock of the Denver and Rio Grande Railroad Company, an insolvent corporation, and that the executors and appraiser mistakenly believed the shares of stock owned by the deceased were shares of stock of the solvent corporation; that on November 12, 1929, the County Court of Cook County entered an order amending the appraiser's report and fixing the amount of tax due at the sum of $56,538.90; that in December, 1929, the executors filed their petition, duly sworn to by them, with the State Treasurer for a refund of $1,161.05 of the tax paid and attached to the petition a certified order of the County Court amending the appraiser's report and fixing the tax due at $56,538.90; and that the State Treasurer denied the prayer of the petition and refused to refund the tax.

A copy of the petition presented to the State Treasurer is attached to the stipulation and made a part thereof. It appears from this petition that the same facts were submitted to the State Treasurer as are submitted to this court. Section 10 of the Inheritance Tax Act provides that when any amount of an inheritance tax has been erroneously paid to the State Treasurer it shall be lawful for him on satisfactory proof to refund the amount so erroneously paid to the party who made the payment, provided application for repayment shall be made within two years from the date of the payment. The Inheritance Tax Act is a complete code, and the only provision it contains for the refund of a tax erroneously paid is Section 10. That section makes it the duty of the State Treasurer to refund any part of a tax erroneously paid if application therefore is made within two years; but it also clothes him with the power to determine from the proofs submitted to him whether or not the payments were erroneous. Within two years after making the alleged erroneous payment claimants made application to the State Treasurer to have it refunded, submitting to him the same proofs submitted to this court. He denied their application and refused to refund the tax. Whether his decision was right or wrong is not a matter for this court to determine. Where the legislature has given an officer, commission, or department of the State government power to act and decide upon a question the court of claims has no jurisdiction to review the decision. (*Moline Plow Co.* vs. *State*, 5 Ct. Cl. 93; *Linden* vs. *State*, 5 Ct. Cl. 150; *Gray* vs. *McCance*, 14 Ill. 343; *McGhee* vs. *Wright*, 16 Ill. 555; *Bennett* vs. *Farrar*, 2 Gil. 598.)

The claim is therefore denied and the case dismissed.

(No. 1664—Claim denied.)

D. L. MARSHALL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 8, 1931.

Rehearing denied January 12, 1932.

PROPERTY DAMAGE—*when no award will be made.* Where there is no proof of negligence on part of party charged, no recovery can be had, on a claim based thereon.

Per Curiam:

This is a claim brought to recover damages on account of injury to a horse on which the claimant was riding in the

County of Clay in the State of Illinois. The accident occurred on the 28th day of February 1930. The claimant alleges that a State Truck driven by M. A. Newton struck the horse and caused the damages. The Attorney General comes and defends and states that the truck driver was going at a rate of speed of about eight or ten miles per hour; that the truck was passing a spring wagon going in the same direction. The claimant contends that he was riding on the shoulder of the road. However, there is no evidence to show that the truck got off the road or the cement slab. It does appear that the horse got frightened and perhaps the truck driver got alarmed and therefore a collision. This court fails to find that the driver of the truck was negligent but that the truck was going at a reasonable rate of speed. It is regrettable for claimant to lose his horse but from all the facts and circumstances the court is of the opinion that the State of Illinois should not assume responsibility in an action of this kind.

Therefore the court recommends that the claim be disallowed.

(No. 1678—Claim denied.)

SETH SEIDERS, INCORPORATED, A DELAWARE CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 8, 1931.

FRANCHISE TAX—*when no award will be made.* Where amount of franchise tax is computed and collected by Secretary of State in accordance with law, based on information submitted by claimant, a claim for rebate of a part thereof alleged to have been excessive, on account of error in information furnished by claimant will be denied.

Per Curiam:

It appears that the claimant is a corporation organized and known as a Delaware Corporation, a foreign corporation and that they desire to do business in the State of Illinois and that they filed with the Secretary of State information as required by law as to the amount of business and the amount of property which such corporation would have in this State during their first year of business. It appears also that the Secretary of State on information furnished by claimant did compute the franchise fee for doing business in the State during its first year. The claimant now contends

that they should have been taxed at a less percentage than the estimate indicated and should be rebated the difference.

It appears to this court that the Secretary of State followed the directions of the Legislature in computing and collecting taxes and if there was an error in the statements of claimant as to their volume of business or capital stock it was not the fault of the Secretary of State or the State of Illinois and consequently this court is of the opinion that the law was followed in this transaction and the court therefore recommends that claim be disallowed.

(No. 1683—Claim denied.)

GEORGE G. BATES, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 8, 1931.

PERSONAL INJURIES—*when no award will be made.* Where injured employee is paid amount equal to or greater than would be awarded under provisions of Workmen's Compensation Act, in the way of salary while he was absent from his duties, owing to injuries, a claim for further compensation will be denied.

Per Curiam:

This is a claim brought to recover for personal injuries under the Workmen's Compensation Act or the provisions thereof.

It appears that claimant has been a janitor for a number of years under the direct supervision of the Secretary of State and while thus engaged on February 20, 1930, he alleges to have accidently fallen from a table to the floor while handling mail sacks. From the injury thus received he claimed to have suffered some permanent disability. From the records in this case it appears that claimant was absent from his duties for a period of three months and during said time he received his full salary. It further appears that a report of a State physician following a thorough physical examination finds no permanent disability.

This court is of the opinion that the State of Illinois treated the claimant very fairly. He drew his full salary and that should off-set his claim for medical service and under the Workmen's Compensation Act we do not believe he could re-

cover a greater amount. His was not a hazardous occupation and should not be considered extra hazardous and the court believes that the State of Illinois has been kind and generous to the claimant and that he has received all that he is entitled to.

Therefore the court recommends that the claim be disallowed.

(No. 1740—Claimant awarded $1003.98.)

WALTER J. RUEDIGER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 8, 1931.

MAX MURDOCK, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

SERVICES—*expenses.* Where it appears that claimant performed services and incurred expenses in performance of duties, lawfully assigned to him by a State Department and that at the time there were funds in the appropriation to pay for same, but before application for payment was made the appropriation lapsed, and it is conceded by the proper department and Attorney General that the State is indebted to claimant, in the amount claimed an award for same will be made.

Mr. JUSTICE THOMAS delivered the opinion of the court:

This claim is for services and expenses of claimant as a member of the committee designated by the Director of Registration and Education for the Profession of Real Estate Brokers pursuant to the provisions of the Civil Administrative Code. At the time the services were rendered and the expenses incurred for which this claim is filed there was ample funds in the appropriation made to the Department of Registration and Education to pay them, but before application for payment was made the appropriation lapsed. It is conceded by the Director of the Department of Registration and Education and the Attorney General that the State owes claimant for services and expenses rendered as a member of such committee the sum of $1,003.98. His claim is therefore allowed and he is awarded the sum of $1,003.98.

(No. 1751—Claim denied.)

OSCAR PIHL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 8, 1931.

WALTER E. LINDGREN, for claimant.

OSCAR E. CARLSTROM, Attorney General; FRANK R. EAGLETON, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be denied.* Where the evidence shows that claimant had received from the State all that he was entitled to for accidental injuries, claim for further compensation will be denied.

MR. JUSTICE THOMAS delivered the opinion of the court:

Claimant was employed by the State as a laborer in the Division of Highways and on December 31, 1926, while engaged in his work, received an injury to his foot which resulted in his being unable to work for about eight months. On November 27, 1929, while engaged at his work, he was struck by an automobile resulting in an injury to his head and bruises on his person. This last injury incapacitated him for work for about six weeks. He has filed his claim under the Workmen's Compensation Act for $3,000.00.

The record shows that the State paid all his hospital and doctors bills and paid him his regular wage of $4.50 per day during a considerable portion of the time he was unable to work on account of the first injury and $2.25 a day for a part of the time. It also shows that he was paid his regular wage of $4.50 during the time he was incapacitated by the second injury. The injuries arose out of and in the course of his employment, and the State became liable to compensate him in accordance with the provisions of the Workmen's Compensation Act. From the evidence on file we find that he has received from the State all that he was entitled to receive and the claim is therefore denied and the case dismissed.

(No. 1753—Claim denied.)

FRANZ RYDELL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 8, 1931.

WALTER E. LINDGREN, for claimant.

OSCAR E. CARLSTROM, Attorney General; FRANK R. EAGLETON, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*proof necessary to obtain award.* Employee of State seeking compensation for injuries must show that such injuries were accidental, that they arose out of and in course of employment while engaged in extra hazardous employment, that same incapacitated him from work and for what period of time.

SAME—*when no award will be made.* Where claimant fails to introduce any evidence of injury, except his own statement, which is contradicted by physician called by him and fails to show that he was incapacitated for work and if so, for what length of time an award will be denied.

Mr. JUSTICE THOMAS delivered the opinion of the court:

Claimant charges in his declaration that while he was working for the Division of Highways on August 12, 1930, an automobile, driven by Mrs. Alice Cryderman, struck him knocking him into one of the barricades on the pavement, and as a result thereof his back was wrenched, his left leg bruised and he suffered a nervous shock. The proof does show that Mrs. Cryderman's car struck him, but there is no evidence, other than his own statement, that he was injured thereby. A physician called by him testified that he is a person "of low mentality, below normal," and that such condition was not the result of the accident. He also testified that the claimant was physically capable of doing heavy work. While an employee of the State who is injured and whose injury arose out of and in the course of his employment is entitled to compensation for such injuries, the compensation to be paid depends upon whether the injury incapacitated him from work and, if so, what length of time. The employee must introduce evidence showing he is entitled to compensation and for what length of time. This claimant has failed to do. As the court cannot base award upon conjecture the claim is denied and the case dismissed.

(Nos. 1794, 1795, 1796, 1797, 1798—Claims dismissed.)

W. A. BLACK COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 8, 1931.

DISMISSAL—*when case may be dismissed upon motion of Attorney General.* A case may be dismissed upon motion of Attorney General where claimant fails to comply with rules of court.

RULES OF COURT—*failure to file copy of contract sued on.* Where claimant fails to file copy of contract upon which claim is based with declaration and fails to state in declaration whether claim has been presented to any State department, and if so what action was taken thereon, the case may be dismissed on motion.

Per Curiam:

The declarations in these cases are based upon contracts alleged to have been entered into by the claimant with the State, but no copies of the contracts are filed with the declarations as required by Rule 4 of the court. The declarations further show that the claims therein mentioned have been presented to the Department of Public Works and Buildings and are now pending in that department for disposition. The Attorney General has filed a motion to strike the declarations from the files. Rule 4 requires a copy of such contract to be filed with the declaration together with the name and present address of the officer with whom such a contract was made. Rule 5 requires claimant to state in his declaration whether or not his claim has been presented to any State department and if it has been so presented what action was taken thereon. It is thus apparent from the allegations of these declarations that the claims have also been prematurely filed as they are still pending before the Department of Public Works and Buildings.

The motion is therefore allowed, the declarations stricken from the files and the claims dismissed, without prejudice.

(No. 1526—Claim denied.)

AMERICAN CEREAL-COFFEE COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 4, 1931.

AMERICAN CEREAL—COFFEE COMPANY, pro se.

OSCAR E. CARLSTROM, Attorney General; DAVID J. KADYK, Assistant Attorney General, for respondent.

FRANCHISE TAX—*tax voluntarily paid cannot be recovered.* A tax voluntarily paid without duress or compulsion cannot be recovered.

Mr. JUSTICE THOMAS delivered the opinion of the court:

The claim in this case is for the refund of an alleged overpayment of a franchise tax of $13.05. The State has filed a demurrer to the declaration.

It appears from the declaration that the Secretary of State assessed a franchise tax of $75.00 against claimant and that claimant voluntarily paid the tax assessed on June 28, 1928, without making any protest or objection to the correctness

of the amount assessed. It is settled in this State that a tax voluntarily paid cannot be recovered back.

The demurrer is therefore sustained.

(No. 1609—Claimant awarded $78.00.)

ROSALTHIA P. TUNNICLIFF AND G. S. ROLLETT, Claimants, vs. STATE OF ILLINOIS, Respondents.

Opinion filed November 4, 1931.

S. S. GROVES, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*overflow—State not liable for.* The State is not liable for damages caused by overflow.

SAME—*equity and good conscience—when award may be made.* Where it appears that growing crop of corn was damaged by overflow, responsibility for which is acknowledged by a State Department, an award may be made on the grounds of equity and good conscience.

Mr. JUSTICE ROE delivered the opinion of the court:

This is a claim in the amount of $104.00 for damages to a growing crop of corn caused by water overflowing the claimants land in the summer of 1929.

Claimant G. S. Rollett was the tenant of claimant Rosalthia P. Tunnicliff, owner of a farm situated on State Highway No. 96, one-half mile north of the Village of Marcelline, Adams County, Illinois.

Claimants had a crop of growing corn in which they each had an equal share on a 13 acre field adjacent to the highway. A new hard road State Highway, known as S. B. I. Route No. 96 contiguous to this 13 acre field was built prior to the summer of 1929. In the building of the new road the drainage conditions at this point were not materially changed from those which existed on the original road but a new system of drainage incident to changed construction was necessary.

The evidence does not disclose any faulty construction of this State Highway, nor does the record show any negligence on the part of the State in the building of the drainage system. However, the fact is undisputed that in the months of June

and July, 1929, during heavy rainfalls, water caused by freshets overflowed the growing crop of corn in the field of the complainants. This field, near the roadway was low, and there was a small basin with no natural outlet. This basin or low land had been subject to overflow prior to the building of the new State Highway. There is some difference of opinion in the evidence as to the exact size of this basin and also as to the size of the portion of the field outside of this basin which was overflowed during June and July, 1929. The claimants allege that the one acre of growing corn was totally destroyed and 50 per cent of two more acres was injured.

It appears from the evidence that the new drainage system at this point was not quite adequate to carry off the water resulting from unusually heavy rainfalls.

From the report on this claim submitted by the Division of Highways, Department of Public Works and Buildings, State of Illinois, we quote the following:

"The matter of drainage at this location was brought to our attention some time during the latter part of the summer of 1929, and there is a well-defined draw to the east of the State Highway and as we were attempting to carry water in our road ditches for too great a distance, we decided to construct a 2 x 2 reinforced concrete culvert at station 198-12 in order to relieve the water from our west road ditch. This culvert was constructed about the middle of May, 1930.

"There is no question in my mind but what the crop in this field was damaged to some extent during the extremely heavy rain falls in that vicinity during the months of June and July of 1929, and that this damage was sustained solely due to the fact that we were attempting to carry the water in our west road ditch for too great a distance without passing it underneath the road and to the east in which the natural course lies at this particular location."

This report acknowledges responsibility for damage to the growing crop of corn. The question arises as to the extent of the damage. According to the statement submitted by the State of Illinois not more than one and one-fourth acres was totally damaged as the result of the overflow. Claimants estimate two acres were totally damaged. Taking into consideration all the circumstances, facts, and evidence submitted this court finds that one and one-half acres of the growing crop of corn was totally destroyed.

The Bill of Particulars sets forth that the average yield of the field was 65 bushels per acre and claims the price was 80 cents per bushel.

In the case of *Illinois Traction, Inc.* vs. *State of Illinois*, Court of Claims Reports, Volume 5, Page 422, this court held that the State is not liable for damage caused by overflow, therefore we determine that there is in this case no legal liability on the part of the State of Illinois.

Although there is no legal liability we believe that in equity and good conscience the claimants, Rosalthia P. Tunnicliff and G. S. Rollett, should be reimbursed on account of the losses sustained and accordingly an award is allowed in the sum of $78.00.

(No. 1809—Claim denied.)

HENRY WISKIRCHEN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 4, 1931.

RICHARD F. SCHOLZ, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

LIMITATIONS—*pleading.* Where it appears on the face of the declaration that claim is barred by Statute of Limitations, plea of same will be sustained and claim dismissed.

Mr. JUSTICE ROE delivered the opinion of the court:

The claimant, Henry Wiskirchen, claims damages in the amount of $80.00 for embalming, furnishing a casket and burying one Henry C. Dickson, a member of the Illinois Soldiers and Sailors Home of Quincy, Illinois, on the third day of November, A. D. 1918.

The declaration of the claimant avers a verbal agreement with Captain John E. Andrew, superintendent of the said Home, acting in his official capacity, whereby the claimant was engaged to embalm, furnish a casket and bury the body of Henry C. Dickson, deceased.

A bill for $80.00, the cost of said embalming, casket and burial was presented to the said Captain John E. Andrew immediately after the burial, but claimant says he never received payment.

Afterward the claimant presented his claim to the Department of Public Welfare which he alleges failed to pay the same.

Finally on the 6th day of August, 1931, he filed his claim in this court.

The respondent, by Oscar E. Carlstrom, Attorney General, pleads the Statute of Limitations because the claimant did not file his claim within five years from the time his cause of action first accrued as required by section of "An Act to create the Court of Claims and to prescribe its power and duties," approved June 25, 1917 (Par. 436, Chap. 37, Smith-Hurd's Illinois Rev. Statutes, 1929).

Because on the face of the declaration this cause of action is barred by the Statute of Limitations, the plea of the respondent is sustained, the claim disallowed, and the case dismissed.

(No. 930—Claim dismissed.)

COMMERCIAL STEEL COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 5, 1931.

DISMISSAL—*when case will be dismissed for want of prosecution.* **Where, upon motion of Attorney General to show cause why case should not be dismissed for want of prosecution, cause is not shown by claimant, case will be dismissed.**

Per Curiam:

Now comes Oscar E. Carlstrom, Attorney General, and makes his motion for dismissal, pursuant to an order to show cause entered by this court on the 8th day of September, A. D. 1931, wherein the claimant was ordered to show cause on or before November 3, 1931, why this case should not be dismissed for want of prosecution.

And it appearing to the court that cause has not been shown by claimant in accordance with said order, it is hereby ordered that the claim be dismissed without an award and the case stricken from the docket.

(No. 943—Claim dismissed.)

MARIE D. KENWORTHY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 5, 1931.

DISMISSAL—*when case will be dismissed for want of prosecution.* **Where, upon motion of Attorney General to show cause why case should not be dismissed for want of prosecution, cause is not shown by claimant, case will be dismissed.**

Per Curiam:

Now comes Oscar E. Carlstrom, Attorney General, and makes his motion for dismissal, pursuant to an order to show cause entered by this court on the 8th day of September, A. D. 1931, wherein the claimant was ordered to show cause on or before November 3rd, 1931, why this case should not be dismissed for want of prosecution.

And it appearing to the court that cause has not been shown by claimant in accordance with said order, it is hereby ordered that the claim be dismissed without an award and the case stricken from the docket.

(No. 1031—Claim dismissed.)

KENNETH LYLE CLAYTON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 5, 1931.

DISMISSAL—*when case will be dismissed for want of prosecution.* Where upon motion of Attorney General to show cause why case should not be dismissed for want of prosecution, cause is not shown by claimant, case will be dismissed.

Per Curiam:

Now comes Oscar E. Carlstrom, Attorney General, and makes his motion for dismissal, pursuant to an order to show cause entered by this court on the 8th day of September, A. D. 1931, wherein the claimant was ordered to show cause on or before November 3, 1931, why this case should not be dismissed for want of prosecution.

And it appearing to the court that cause has not been shown by claimant in accordance with said order, it is hereby ordered that the claim be dismissed without an order and the case stricken from the docket.

(Nos. 1170 and 1171—Claims dismissed.)

TONY THOMAS, Claimant, No. 1170 AND ROSE THOMAS, No. 1171, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 5, 1931.

DISMISSAL—*when case will be dismissed for want of prosecution.* Where, upon motion of Attorney General to show cause why case should not be dismissed for want of prosecution, cause is not shown by claimant, case will be dismissed.

Per Curiam:

Now comes Oscar E. Carlstrom, Attorney General, and makes motion for dismissal, pursuant to an order to show cause entered by this court on the 8th day of September, A. D. 1931, wherein the claimant was ordered to show cause on or before November 3rd, 1931, why this case should not be dismissed for want of prosecution.

And it appearing to the court that cause has not been shown by claimant in accordance with said order, it is hereby ordered that the claim be dismissed without an award and the case stricken from the docket.

(No. 1181—Claim dismissed.)

HARRY F. BARNSTETTER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 5, 1931.

DISMISSAL—*when case will be dismissed for want of prosecution.* Where, upon motion of Attorney General to show cause why case should not be dismissed for want of prosecution, cause is not shown by claimant, case will be dismissed.

Per Curiam:

Now comes Oscar E. Carlstrom, Attorney General, and makes motion for dismissal, pursuant to an order to show cause entered by this court on the 8th day of September, A. D. 1931, wherein the claimant was ordered to show cause on or before November 3rd, 1931, why this case should not be dismissed for want of prosecution.

And it appearing to the court that cause has not been shown by claimant in accordance with said order, it is hereby ordered that the claim be dismissed without an award and the case stricken from the docket.

(No. 1233—Claim dismissed.)

STANLEY MAZARKA, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 5, 1931.

DISMISSAL—*when case will be dismissed for want of prosecution.* Where, upon motion of Attorney General to show cause why case should not be dismissed for want of prosecution, cause is not shown by claimant, case will be dismissed.

Per Curiam:

Now comes Oscar E. Carlstrom, Attorney General, and makes motion for dismissal, pursuant to an order to show cause entered by this court on the 8th day of September, A. D. 1931, wherein the claimant was ordered to show cause on or before November 3rd, 1931, why this case should not be dismissed for want of prosecution.

And it appearing to the court that cause has not been shown by claimant in accordance with said order, it is hereby ordered that the claim be dismissed without an award and the case stricken from the docket.

(No. 1293—Claim dismissed.)

SWENEY GAS & OIL COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 5, 1931.

DISMISSAL—*when case will be dismissed for want of prosecution.* Where, upon motion of Attorney General to show cause why case should not be dismissed for want of prosecution, cause is not shown by claimant, case will be dismissed.

Per Curiam:

Now comes Oscar E. Carlstrom, Attorney General, and makes his motion for dismissal, pursuant to an order to show cause entered by this court on the 8th day of September, A. D. 1931, wherein the claimant was ordered to show cause on or before November 3rd, 1931, why this case should not be dismissed for want of prosecution.

And it appearing to the court that cause has not been shown by claimant in accordance with said order, it is hereby ordered that the claim be dismissed without an award and the case stricken from the docket.

(No. 1367—Claim dismissed.)

ED S. SMITH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 5, 1931.

DISMISSAL—*when case will be dismissed for want of prosecution.* Where, upon motion of Attorney General to show cause why case should not be dismissed for want of prosecution, cause is not shown by claimant, case will be dismissed.

Per Curiam:

Now comes Oscar E. Carlstrom, Attorney General, and makes his motion for dismissal, pursuant to an order to show cause entered by this court on the 8th day of September, 1931, wherein the claimant was ordered to show cause on or before November 3rd, 1931, why this case should not be dismissed for want of prosecution.

And it appearing to the court that cause has not been shown by claimant in accordance with said order, it is hereby ordered that the claim be dismissed without an award and the case stricken from the docket.

(No. 1380—Claim dismissed.)

JOSEPH E. STILES AND ETHEL P. STILES, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 5, 1931.

DISMISSAL—*when case will be dismissed for want of prosecution.* **Where, upon motion of Attorney General to show cause why case should not be dismissed for want of prosecution, cause is not shown by claimant, case will be dismissed.**

Per Curiam:

Now comes Oscar E. Carlstrom, Attorney General, and makes his motion for dismissal, pursuant to an order to show cause entered by this court on the 8th day of September, 1931, wherein the claimant was ordered to show cause on or before November 3rd, 1931, why this case should not be dismissed for want of prosecution.

And it appearing to the court that cause has not been shown by claimant in accordance with said order, it is hereby ordered that the claim be dismissed without an award and the case stricken from the docket.

(No. 1403—Claim dismissed.)

RUSSELL L. CARPENTER AND JOHN CARPENTER, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 5, 1931.

DISMISSAL—*when case will be dismissed for want of prosecution.* **Where, upon motion of Attorney General to show cause why case should not be dismissed for want of prosecution, cause is not shown by claimant, case will be dismissed.**

Per Curiam:

Now comes Oscar E. Carlstrom, Attorney General, and makes his motion for dismissal, pursuant to an order to show cause entered by this court on the 8th day of September, A. D. 1931, wherein the claimant was ordered to show cause on or before November 3rd, 1931, why this case should not be dismissed for want of prosecution.

And it appearing to the court that cause has not been shown by claimant in accordance with said order, it is hereby ordered that the claim be dismissed without an award and the case stricken from the docket.

(No. 1419—Claim dismissed.)

JUSTUS A. LARSON, ADMINISTRATOR OF ESTATE OF VICTER A. LARSON, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 5, 1931.

DISMISSAL—*when case will be dismissed for want of prosecution.* Where, upon motion of Attorney General to show cause why case should not be dismissed for want of prosecution, cause is not shown by claimant, case will be dismissed.

Per Curiam:

Now comes Oscar E. Carlstrom, Attorney General, and makes his motion for dismissal, pursuant to an order to show cause entered by this court on the 8th day of September, A. D. 1931, wherein the claimant was ordered to show cause on or before November 3rd, 1931, why this case should not be dismissed for want of prosecution.

And it appearing to the court that cause has not been shown by claimant in accordance with said order, it is hereby ordered that the claim be dismissed without an award and the case stricken from the docket.

(No. 1458—Claim dismissed.)

EMIL ALLGAIER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 5, 1931.

DISMISSAL—*when case will be dismissed for want of prosecution.* Where, upon motion of Attorney General to show cause why case should not be dismissed for want of prosecution, cause is not shown by claimant, case will be dismissed.

Per Curiam:

Now comes Oscar E. Carlstrom, Attorney General, and makes his motion for dismissal, pursuant to an order to show cause entered by this court on the 8th day of September, A. D. 1931, wherein the claimant was ordered to show cause on or before November 3rd, 1931, why this case should not be dismissed for want of prosecution.

And it appearing to the court that cause has not been shown by claimant in accordance with said order, it is hereby ordered that the claim be dismissed without an award and the case stricken from the docket.

(No. 1502—Claim dismissed.)

EVERHARDT HEISSINGER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 5, 1931.

DISMISSAL—*when case will be dismissed for want of prosecution.* Where, upon motion of Attorney General to show cause why case should not be dismissed for want of prosecution, cause is not shown by claimant, case will be dismissed.

Per Curiam:

Now comes Oscar E. Carlstrom, Attorney General, and makes his motion for dismissal, pursuant to an order to show cause entered by this court on the 8th day of September, A. D. 1931, wherein the claimant was ordered to show cause on or before November 3rd, 1931, why this case should not be dismissed for want of prosecution.

And it appearing to the court that cause has not been shown in accordance with said order, it is hereby ordered that the claim be dismissed without an award and the case stricken from the docket.

(No. 1512—Claim dismissed.)

IDA KINKIE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 5, 1931.

DISMISSAL—*when case will be dismissed for want of prosecution.* Where, upon motion of Attorney General to show cause why case should not be dismissed for want of prosecution, cause is not shown by claimant, case will be dismissed.

Per Curiam:

Now comes Oscar E. Carlstrom, Attorney General, and makes his motion for dismissal, pursuant to an order to show cause entered by this court on the 8th day of September, A. D. 1931, wherein the claimant was ordered to show cause on or before November 3rd, 1931, why this case should not be dismissed for want of prosecution.

And it appearing to the court that cause has not been shown by claimant in accordance with said order, it is hereby ordered that the claim be dismissed without an award and the case stricken from the docket.

(No. 1537—Claim dismissed.)

EDWARD G. MARTIN AND EVA S. MARTIN, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 5, 1931.

DISMISSAL—*when case will be dismissed for want of prosecution.* Where, upon motion of Attorney General to show cause why case should not be dismissed for want of prosecution, cause is not shown by claimant, case will be dismissed.

Per Curiam:

Now comes Oscar E. Carlstrom, Attorney General, and makes his motion for dismissal, pursuant to an order to show cause entered by this court on the 8th day of September, A. D. 1931, wherein the claimant was ordered to show cause on or before November 3rd, 1931, why this case should not be dismissed for want of prosecution.

And it appearing to the court that cause has not been shown by claimant in accordance with said order, it is hereby ordered that the claim be dismissed without an award and the case stricken from the docket.

(No. 1541—Claim dismissed.)

P. F. WEINRICH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 5, 1931.

DISMISSAL—*when case will be dismissed for want of prosecution.* Where, upon motion of Attorney General to show cause why case should not be dismissed for want of prosecution, cause is not shown by claimant, case will be dismissed.

Per Curiam:

Now comes Oscar E. Carlstrom, Attorney General, and makes his motion for dismissal, pursuant to an order to show cause entered by this court on the 8th day of September, A. D. 1931, wherein the claimant was ordered to show cause on or before November 3rd, 1931, why this case should not be dismissed for want of prosecution.

And it appearing to the court that cause has not been shown by claimant in accordance with said order it is hereby ordered that the claim be dismissed without an award and the case stricken from the docket.

(No. 1628—Claim dismissed.)

FRED W. EPLEY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 5, 1931.

DISMISSAL—*when case will be dismissed for want of prosecution.* Where, upon motion of Attorney General to show cause why case should not be dismissed for want of prosecution, cause is not shown by claimant, case will be dismissed.

Per Curiam:

Now comes Oscar E. Carlstrom, Attorney General, and makes motion for dismissal, pursuant to an order to show cause entered by this court on the 8th day of September, A. D. 1931, wherein the claimant was ordered to show cause on or before November 3rd, 1931, why this case should not be dismissed for want of prosecution.

And it appearing to the court that cause has not been shown by claimant in accordance with said order, it is hereby ordered that the claim be dismissed without an award and the case stricken from the docket.

(No. 1839—Claimant awarded $6,348.20.)

ARCOLE CONSTRUCTION CO., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1931.

ARCOLE CONSTRUCTION CO., pro se.

OSCAR E. CARLSTROM, Attorney General, for respondent.

CONTRACTS—*work performed and materials furnished under contract, cancelled before completion because of invalidity of law under which awarded when award may be made in compliance with stipulation.* An award is made herein on the authority of *Bishop Construction Co., vs. State*, No. 1845, *supra*.

Mr. JUSTICE THOMAS delivered the opinion of the court:

On August 24, 1931, the Department of Public Works and Buildings awarded a contract to claimant for the construction of Section 464-MY on State Bond Issue Route No. 46. Claimant executed the contract and bond required by the Department and immediately thereafter commenced performance on the contract. On October 21, 1931, the Department notified claimant that payments for work done under the contract could not be made from the general appropriation for such work because the Act under which the contract was awarded had been held invalid by the Supreme Court. The contract was made and the work thereunder performed in good faith, both the Department and claimant believing it to be valid.

The Department and the Attorney General have stipulated that claimant is entitled to the sum of $6,348.20 for the work done by it and claimant is therefore awarded that sum in compliance with said stipulation.

(No. 1840—Claimant awarded $3,768.81.)

DECKERT AND MCDOWELL, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1931.

DECKER AND MCDOWELL, pro se.

OSCAR E. CARLSTROM, Attorney General, for respondent.

CONTRACTS—*work performed under contract cancelled before completion, because of invalidity of law under which awarded-stipulation-when award may be made thereon.* An award is made herein on authority of *Bishop Construction Co. vs. State*, No. 1845, *supra*.

Mr. JUSTICE THOMAS delivered the opinion of the court:

On September 3, 1931, the Department of Public Works and Buildings awarded a contract to claimants for the construction of Section 430-VB on State Bond Issue Route No. 4. Claimants executed the contract and bond required by the

Department and immediately thereafter commenced performance on the contract. On October 21, 1931, the Department notified claimants that payments for work done under the contract could not be made from the general appropriations for such work because the Act under which the contract was awarded had been held invalid by the Supreme Court. The contract was made and the work thereunder performed in good faith, both the Department and claimants believing it to be valid.

The Department and the Attorney General have stipulated that claimants are entitled to the sum of $3,768.81 for the work done by them and claimants are therefore awarded that sum in compliance with said stipulation.

(No. 1841—Claimant awarded $11,359.81.)

CAMERON-JOYCE COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1931.

CAMERON-JOYCE & COMPANY, pro se.

OSCAR E. CARLSTROM, Attorney General, for respondent.

CONTRACTS—*work performed under contract, cancelled before completion, because of invalidity of law under which awarded-stipulation-when award may be made thereon.* An award is made herein on authority of *Bishop Construction Co., vs. State*, No. 1845, *supra.*

Mr. JUSTICE THOMAS delivered the opinion of the court:

On September 19, 1931, the Department of Public Works and Buildings awarded a contract to claimant for the construction of Section 105 on State Bond Issue Route No. 99. Claimant executed the contract and bond required by the Department and immediately thereafter commenced performance on the contract. On October 21, 1931, the department notified claimant that payments for work done under the contract could not be made from the general appropriations for such work because the Act under which the contract was awarded had been held invalid by the Supreme Court. The contract was made and the work thereunder performed in good faith, both the department and claimant believing it to be valid.

The department and the Attorney General have stipulated that claimant is entitled to the sum of $11,359.81 for the work done by it and claimant is therefore awarded that sum in compliance with said stipulation.

(No. 1842—Claimant awarded $188.50.)

H. H. GUNTHER CONST. CO., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1931.

H. H. GUNTHER CONST. CO., pro se.

OSCAR E. CARLSTROM, Attorney General, for respondent.

CONTRACTS—*work performed under contract, cancelled before completion, because of invalidity of law under which awarded—stipulation—when award may be made thereon.* An award is made herein on authority of *Bishop Construction Co. vs. State, No. 1845, supra.*

Mr. JUSTICE THOMAS delivered the opinion of the court:

On September 21, 1931, the Department of Public Works and Buildings awarded a contract to claimants for the construction of Section 1-W on State Bond Issue Route No. 28. Claimants executed the contract and bond required by the department and immediately commenced performance on the contract. On October 21, 1931, the department notified claimants that payments for work done under the contract could not be made from the general appropriations for such work because the Act under which the contract was awarded had been held invalid by the Supreme Court. The contract was made and the work thereunder performed in good faith, both the department and claimants believing it to be valid.

The department and the Attorney General have stipulated that claimants are entitled to the sum of $188.50 for the work done by them and claimants are therefore awarded that sum in compliance with said stipulation.

(No. 1843—Claimant awarded $3,202.43.)

JANSEN AND SCHAEFER, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1931.

JANSEN AND SCHAEFER, pro se.

OSCAR E. CARLSTROM, Attorney General, for respondent.

CONTRACTS—*work performed under contract, cancelled before completion, because of invalidity of law under which awarded—stipulation—when award may be made thereon.* An award is made herein on authority of Bishop Construction Co., No. 1845, *supra*.

Mr. JUSTICE THOMAS delivered the opinion of the court:

On September 19, 1931, the Department of Public Works and Buildings awarded a contract to claimant for the construction of Section 105-A on State Bond Issue Route No. 89-C. Claimant executed the contract and bond required by the department and immediately thereafter commenced performance on the contract. On October 21, 1931, the department notified claimant that payments for work done under the contract could not be made from the general appropriations for such work because the Act under which the contract was awarded had been held invalid by the Supreme Court. The contract was made and the work thereunder performed in good faith, both the department and claimant believing it to be valid.

The department and the Attorney General have stipulated that claimant is entitled to the sum of $3,202.43 for the work done by it and claimant is therefore awarded that sum in compliance with said stipulation.

(No. 1844—Claimant awarded $2,351.28.)

ZIMMERLY BRIDGE COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1931.

ZIMMERLY BRIDGE COMPANY, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*work performed and materials furnished under contract held invalid—damages—stipulation—when award may be made.* The facts herein are the same as in *Bishop Construction Co. vs. State*, No. 1845, *supra* and the opinion in that case is controlling herein.

Mr. JUSTICE CLARITY delivered the opinion of the court:

This is a similar case in fact and law as the Bishop Construction Co., No. 1845, which case this court discusses at

length and for that reason will not go into a lengthy discussion in this case.

It appears that claimant entered a bid for certain road construction work on State Bond Issue Route No. 101. Its bid was accepted by the Department of Public Works and Buildings and claimant having filed bond as required by law immediately commenced performance of the contract between the State and itself according to the bid and under the direction of the Division of Highways. On the 6th day of October, 1931, they received notice through the Division of Highways, Department of Public Works and Buildings that no payment could be made for the work under said contract for the reason that the "Prevailing Wage Law" under which said contract had been let, was held to be invalid by the courts of the State and that in event claimant proceeded further under said contract it did so at its own peril.

It appears that the Department of Public Works and Buildings, Division of Highways considering the loss and damage to claimant which it suffered without the claimant's fault, concluded to make an adjustment with claimant and entered into a stipulation. After a review of the loss of the claimant, stipulated that the fair, just and reasonable value of the work done and the damage incurred by claimant in its performance under the invalid road construction contract on Route No. 101, would amount to $2,351.28 and the claimant through such stipulation agreed to accept said amount in full and complete settlement for any and all work performed and damages incurred by reason of its performance under the said invalid road contract.

That said stipulation was duly executed by claimant and the Department of Public Works and Buildings, Division of Highways of the State of Illinois, by H. H. Cleveland, Director, and Frank T. Sheets, Chief Highway Engineer, and that said stipulation was approved by Oscar E. Carlstrom, Attorney General of Illinois.

Therefore, it is the opinion of the court that this claim has been considered fairly and justly by the State of Illinois through its proper officers and in view of same and the recommendations indicated by said stipulation, this court recommends that claimant be allowed and awarded the sum of $2,351.28.

(No. 1845—Claimant awarded $3,484.72.)

BISHOP CONSTRUCTION CO., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1931.

BISHOP CONSTRUCTION CO., pro se.

OSCAR E. CARLSTROM, Attorney General; CARL J. DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*work performed and materials furnished under contract held invalid—damages—stipulation—when award may be made.* Where claimant enters into a contract with a department of the State and performs services or furnishes materials thereunder and thereafter, contract is cancelled by State on account of Act under which same was awarded being declared invalid by Supreme Court, an award may be made for damages and work performed and materials furnished, the facts being undisputed, upon stipulation of the parties, approved by the Attorney General.

Mr. JUSTICE CLARITY delivered the opinion of the court:

It appears that claimant submitted a bid for certain road construction work on State Bond Issue Route 130-A. Subsequently the claimant received a letter of award from the Division of Highways, Department of Public Works and Buildings of the State of Illinois and afterwards a contract was entered upon. The claimant furnished bond as required by law and immediately commenced performance under said contract until the 8th day of October, A. D. 1931, when the claimant received notice through the Division of Highways, Department of Public Works and Buildings that no payment could be made for work done under said contract for the reason that the "Prevailing Wage Law" under which said contract had been let, was held to be invalid and void by the courts of this State and that in event claimant proceeded further under said contract it did so at its own peril.

It appears that the Division of Highways of the State of Illinois formed an opinion that claimant was damaged through no fault of the claimant and therefore a stipulation of fact and damage was entered into between claimant and the State of Illinois Department of Public Works and Buildings, by H. H. Cleveland, Director, and Frank T. Sheets, Chief Highway Engineer. In said stipulation it was agreed that the facts set forth in the declaration of the claimant are true and

correct; that said claimant suffered material damage by reason of cancellation of the road construction contract; that on account of the Act under which this contract was made was declared invalid by the Supreme Court of the State of Illinois and that the department would be unable to make any payments on the general appropriation for work performed under said contract or award.

It further appears according to said stipulation that the fair, just and reasonable value of the work done and the damages incurred by claimant in its performance under the said invalid road construction contract should be properly considered to the sum of Three Thousand Four Hundred Eighty-four and 72/100 ($3,484.72) Dollars, as accurately itemized by the statement of claim; that said claimant under said stipulation agrees to accept the sum of ($3,484.72) Three Thousand Four Hundred Eighty-four and 72/100 Dollars in full and complete settlement for any and all work performed and damage incurred by reason of its performance under said invalid road construction contract.

The said stipulation was duly executed and signed by claimant by its president and the Department of Public Works and Buildings, Division of Highways of the State of Illinois, by H. H. Cleveland, Director, and Frank T. Sheets, Chief Highway Engineer, and approved by Oscar E. Carlstrom, Attorney General of Illinois.

Therefore, it is the opinion of the court that this claim has been considered fairly and justly by the State of Illinois through its proper officers and in view of same and the recommendations indicated by said stipulation, this court recommends that claimant be allowed and awarded the sum of $3,484.72.

(No. 1846—Claimant awarded $2,187.65.)

STANLEY JAICKS COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1931.

STANLEY JAICKS COMPANY, *pro se.*

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*work performed under contract, cancelled before completion, because of invalidity of law under which awarded—damages—stipulation—when award may be made.* An award is made herein on authority of *Bishop Construction Co.* vs. *State*, No. 1845, *ante.*

Mr. JUSTICE CLARITY delivered the opinion of the court:

This is a similar case in fact and law as the Bishop Construction Co., No. 1845, which case this court discussed at length and for that reason will not go into a lengthy discussion in this case.

It appears that claimant entered a bid for certain road construction work on State Bond Issue Route No. 53. Its bid was accepted by the Department of Public Works and Buildings and claimant having filed bond as required by law, immediately commenced performance of the contract between the State and itself according to the bid and under the direction of the Division of Highways. On the 6th day of October, 1931, it received notice from the Division of Highways, Department of Public Works and Buildings that no payment could be made for the work under said contract for the reason that the "Prevailing Wage Law" under which said contract had been let, was held to be invalid by the courts of the State and that in event claimant proceeded further under said contract it did so at its own peril.

It appears that the Department of Public Works and Buildings, Division of Highways considering the loss and damage to claimant which it suffered without the claimant's fault, concluded to make an adjustment with claimant and entered into a stipulation. After a review of the loss of the claimant, stipulated that the fair, just and reasonable value of the work done and the damage incurred by claimant in its performance under the invalid road construction contract on Route No. 53 would amount to $2,187.65 and the claimant through such stipulation agreed to accept said amount in full and complete settlement for any and all work performed and damages incurred, by reason of its performance under said invalid road contract.

That said stipulation was duly executed by claimant and the Department of Public Works and Buildings, Division of Highways of the State of Illinois, by H. H. Cleveland, Director, and Frank T. Sheets, Chief Highway Engineer, and that said stipulation was approved by Oscar E. Carlstrom, Attorney General of Illinois.

Therefore, it is the opinion of the court that this claim has been considered fairly and justly by the State of Illinois through its proper officers and in view of same and the recommendations indicated by said stipulation, this court recommends that claimant be allowed and awarded the sum of $2,187.65.

(No. 1847—Claimant awarded $925.74.)

E. D. OTTO, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1931.

E. D. OTTO, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*work performed under contract, cancelled before completion, because of invalidity of law under which awarded—damages—stipulation—when award may be made.* An award is made herein on authority of *Bishop Construction Co.* vs. *State*, No. 1845, *ante*.

MR. JUSTICE CLARITY delivered the opinion of the court:

This is a similar case in fact and law as the Bishop Construction Co., No. 1845, which case this court discussed at length and for that reason will not go into a lengthy discussion in this case.

It appears that claimant entered a bid for certain road construction work on State Bond Issue Route No. 59. His bid was accepted by the Department of Public Works and Buildings and claimant having filed bond as required by law, immediately commenced performance of the contract between the State and himself according to the bid and under the direction of the Division of Highways. On the 8th day of October, 1931, he received notice through the Division of Highways, Department of Public Works and Buildings, that no payment could be made for the work under said contract for he reason that the "Prevailing Wage Law" under which said contract had been let, was held to be invalid by the courts of the State and that in event claimant proceeded further under said contract it did so at its own peril.

It appears that the Department of Public Works and Buildings, Division of Highways, considering the loss and

damage to claimant which he suffered without the claimant's fault, concluded to make an adjustment with claimant and entered into a stipulation. After a review of the loss of the claimant, stipulated that the fair, just and reasonable value of the work done and the damage incurred by claimant in its performance under the invalid road construction contract on Route No. 59 would amount to $925.74 and the claimant through such stipulation agreed to accept said amount in full and complete settlement for any and all work performed and damages incurred by reason of its performance under said invalid road contract.

That the said stipulation was duly executed by claimant and the Department of Public Works and Buildings, Division of Highways of the State of Illinois, H. H. Cleveland, Director, and Frank T. Sheets, Chief Highway Engineer, and that said stipulation was approved by Oscar E. Carlstrom, Attorney General of Illinois.

Therefore, it is the opinion of the court that this claim has been considered fairly and justly by the State of Illinois through its proper officers and in view of same and the recommendations indicated by said stipulation, this court recommends that claimant be allowed and awarded the sum of $925.74.

(No. 1848—Claimant awarded $238.63.)

MIDWEST IMPROVEMENT COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1931.

MIDWEST IMPROVEMENT COMPANY, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*work performed and materials furnished under contract subsequently held invalid—damages—stipulation—when award may be made.* The facts involved herein are similar to those in *Bishop Construction Co.* vs. *State*, No. 1845, *ante* and the opinion therein is controlling in this case.

Mr. JUSTICE ROE delivered the opinion of the court:

This is a suit brought by the claimant, Midwest Improvement Company, a corporation of the City of Chicago, County of Cook, State of Illinois, against the defendant, State of

Illinois, to recover damages caused by the cancellation of road construction contract No. 4576 on State Bond Issue Route No. 5, Section 7-YV awarded on the 21st day of September, 1931.

The facts in this case are as follows: That after the complainant commenced performance under the said contracts it received a notice from the respondent on the 6th day of October, 1931, through its Division of Highways, Department of Public Works and Buildings, that no payments could be made for work done under the contracts for the reason that the "Prevailing Wage Law" under which the contracts had been let was held to be invalid and void by the courts of this State and that in the event the claimant proceeded further under the said contracts, it did so at its own peril. After this notice was received the complainant's forces and machinery remained idle from October 6th to November 2nd, 1931 thereby necessitating considerable expense for which the claimant asked damages, and the State was then and there so notified.

Thereupon, the Division of Highways, Department of Public Works and Buildings, of the State of Illinois, through its Director and Chief Highway Engineer, reached an agreement in settlement of the damages caused as aforesaid and stipulated to make payment in the sum of $238.63. The Attorney General has approved of the said settlement and stipulation; but the Division of Highways could not pay the claim and therefore recommend that a claim be filed with this court.

As there is no dispute as to the facts presented in the claimant's declaration and the evidence establishes the claimant's right of action, the court is of the opinion that the claim is reasonable and should be paid. The court accordingly awards the claimant the sum of $238.63.

(No. 1849—Claimant awarded $20,648.59.)

HARTMAN-CLARK BROTHERS COMPANY, Claimant, *vs.* STATE OF ILLINOIS Respondent.

Opinion filed December 8, 1931.

HARTMAN-CLARK BROTHERS COMPANY, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*work performed and materials furnished under contract subsequently held invalid—damages—stipulation—when award may be made.* The facts involved herein are similar to those in *Bishop Construction Co. vs. State*, No. 1845, *ante* and the opinion therein is controlling in this case.

Mr. JUSTICE ROE delivered the opinion of the court:

This is a suit brought by the claimant, Hartmann-Clark Brothers Company, a corporation, of the City of Peoria, County of Peoria, State of Illinois, against the defendant, State of Illinois, to recover damages caused by the cancellation of road construction contracts Nos. 4543, 4555, 4556, 4557, 4558, 4559, 4574 and 4587 on State Bond Issue Route No. 9, Sections 46-X and 46-X-1, 48 and 48-X, and Route No. 88, Section 126, Route No. 165, Section 124-X, awarded on the 16th day of September, 1931, and Route No. 48, Section 137, and Route 120, Section 115, awarded on the 21st day of September, 1931.

The facts in this case are as follows: That after the complainant commenced performance under the said contracts it received a notice from the respondent on the 6th day of October, 1931, through its Division of Highways, Department of Public Works and Buildings, that no payments could be made for work done under the contracts for the reason that the "Prevailing Wage Law" under which the contracts had been let was held to be invalid and void by the courts of this State and that in the event the claimant proceeded further under the said contracts, it did so at its own peril. When this notice was received the complainant had already completed work under all the contracts except one and thereafter the greater part of complainant's forces and machinery remained idle from October 6th to November 2nd, 1931, thereby necessitating considerable expense in addition to the cost of work completed, for which the claimant asked damages, and the State was then and there so notified.

Thereupon, the Division of Highways, Department of Public Works and Buildings, of the State of Illinois, through its Director and Chief Highway Engineer, after making deductions for cement sacks salvaged, reached an agreement in settlement of the damages caused as aforesaid and stipulated to make payment in the sum of $20,648.59. The Attorney General has approved of the said settlement and stipulation; but the Division of Highways could not pay the claim and therefore recommended that a claim be filed with this court.

As there is no dispute as to the facts presented in the claimant's declaration and the evidence establishes the claimant's right of action, the court is of the opinion that the claim is reasonable and should be paid. The court accordingly awards the claimant the sum of $20,648.59.

(No. 1850—Claimant awarded $19,082.60.)

GUND-GRAHAM COMPANY, Claimant, *vs.* STATE OF ILLINOIS, *Respondent.*

Opinion filed December 8, 1931.

GUND-GRAHAM COMPANY, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*work performed and materials furnished under contract held invalid—damages—stipulation—when award may be made.* Where claimant enters into a contract with a department of the State and performs services or furnishes materials thereunder, and thereafter contract is cancelled by State because of Act under which same was awarded being declared invalid by Supreme Court to the damage of claimant, an award may be made for such damage and work performed and materials furnished, where facts are undisputed, on stipulation of the parties, approved by the Attorney General.

Mr. JUSTICE ROE delivered the opinion of the court:

This is a suit brought by the claimant, Gund-Graham Company, a corporation, of the City of Freeport, County of Cook, State of Illinois, against the defendant, State of Illinois, to recover damages caused by the cancellation of road construction contracts No. 4531, 4540, 4541 and 4542 on State Bond Issue Route No. 47, Section 106, awarded on the 4th day of September, 1931, and Route No. 85, Sections 102, 102-X, and 103-X awarded on the 12th day of September, 1931.

The facts in this case are as follows: That after the complainant commenced performance under the said contracts it received a notice from the respondent on the 6th day of October, 1931, through its Division of Highways, Department of Public Works and Buildings, that no payments could be made for work done under the contracts for the reason that the "Prevailing Wage Law" under which the contracts had been let was held to be invalid and void by the courts of this State and that in the event the claimant proceeded further under the said contracts, it did so at its own peril. When this notice

was received the complainant had already completed work under the contracts costing $8,090.69 and thereafter complainant's forces and machinery remained idle from October 6 to November 2nd, 1931, thereby necessitating considerable expense in addition to the cost of work completed, for which the claimant asked damages, and the State was then and there so notified.

Thereupon, the Division of Highways, Department of Public Works and Buildings, of the State of Illinois, through its Director and Chief Highway Engineer, after making deductions for cement sacks salvaged, reached an agreement in settlement of the damages caused as aforesaid and stipulated to make payment in the sum of $19,082.60. The Attorney General has approved of the said settlement and stipulation; but the Division of Highways could not pay the claim and therefore recommended that a claim be filed with this court.

As there is no dispute as to the facts presented in the claimant's declaration, and the evidence establishes the claimant's right of action, the court is of the opinion that the claim is reasonable and should be paid. The court accordingly awards the claimant the sum of $19,082.60.

(No. 1851—Claimant awarded $4,940.30.)

PRONGER CONSTRUCTION COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1931.

PRONGER CONSTRUCTION COMPANY, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*work performed and materials furnished under contract, cancelled before completion, because of invalidity of law under which awarded—damages—when award may be made.* The facts and issues herein are the same as in *Bishop Construction Co. vs. State*, No. 1845, *ante*, and an award is made in this case on the authority thereof.

Mr. JUSTICE ROE delivered the opinion of the court:

This is a suit brought by the claimant, Pronger Construction Company, a corporation, of the City of Blue Island, County of Cook, State of Illinois, against the defendant, State of Illinois, to recover damages caused by the cancellation of

road construction contract No. 4536 on State Bond Issue Route No. 49, Section 146-X, awarded on the 12th day of September, 1931.

The facts in this case are as follows: That after the complainant commenced performance under the said contract it received a notice from the respondent on the 6th day of October, 1931, through its Division of Highways, Department of Public Works and Buildings, that no payments could be made for work done under the contract for the reason that the "Prevailing Wage Law" under which the contracts had been let was held to be invalid and void by the courts of this State and that in the event the claimant proceeded further under the said contract, it did so at its own peril. When this notice was received the complainant had already completed work under the contract costing $4,940.30, for which the claimant asked damages, and the State was then and there so notified.

Thereupon, the Division of Highways, Department of Public Works and Buildings, of the State of Illinois, through its Director and Chief Highway Engineer, reached an agreement in settlement of the damages caused as aforesaid and stipulated to make payment in the sum of $4,940.30. The Attorney General has approved of the said settlement and stipulation; but the Division of Highways could not pay the claim and therefore recommended that a claim be filed with this court.

As there is no dispute as to the facts presented in the claimant's declaration, and the evidence establishes the claimant's right of action, the court is of the opinion that the claim is reasonable and should be paid. The court accordingly awards the claimant the sum of $4,940.30.

(No. 1852—Claimant awarded $3,556.13.)

McMAHAN CONSTRUCTION COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1931.

McMAHAN CONSTRUCTION COMPANY, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*work performed and materials furnished under contract, cancelled before completion, because of invalidity of law under which awarded —damages—stipulation—when award may be made.* An award is made herein on the authority of *Bishop Construction Co. vs. State*, No. 1845, *ante*.

Mr. JUSTICE ROE delivered the opinion of the court:

This is a suit brought by the claimant, McMahan Construction Company, a corporation, of the City of Rochester, County of Fulton, State of Indiana, against the defendant, State of Illinois, to recover damages caused by the cancellation of road construction contract No. 4537 on State Bond Issue Route No. 47, Section 125-X awarded on the 12th day of September, 1931.

The facts in this case are as follows: That after the complainant commenced performance under the said contracts it received a notice from the respondent on the 6th day of October, 1931, through its Division of Highways, Department of Public Works and Buildings, that no payments could be made for work done under the contracts for the reason that the "Prevailing Wage Law" under which the contracts had been let was held to be invalid and void by the courts of this State and that in the event the claimant proceeded further under the said contracts, it did so at its own peril. When this notice was received the complainant had already completed work under the contract costing $2,814.30, and thereafter complainant's forces and machinery remained idle from October 6th to November 2nd, 1931, thereby necessitating considerable expense in addition to the cost of work completed, for which the claimant asked damages, and the State was then and there so notified.

Thereupon, the Division of Highways, Department of Public Works and Buildings, of the State of Illinois, through its Director and Chief Highway Engineer, reached an agreement in settlement of the damages caused as aforesaid and stipulated to make payment in the sum of $3,556.13. The Attorney General has approved of the said settlement and stipulation, but the Division of Highways could not pay the claim and therefore recommended that a claim be filed with this court.

As there is no dispute as to the facts presented in the claimant's declaration and the evidence establishes the claimant's right of action, the court is of the opinion that the claim is reasonable and should be paid. The court accordingly awards the claimant the sum of $3,556.13.

(No. 1853—Claimant awarded $2,365.27.)

E. J. ALBRECHT COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1931.

E. J. ALBRECHT COMPANY, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*work performed and materials furnished under contract, cancelled before completion because of invalidity of law under which awarded —damages—stipulation—when award may be made.* An award is made herein on the authority of Bishop Construction Co., No. 1845, *ante.*

Mr. JUSTICE ROE delivered the opinion of the court:

This is a suit brought by the claimant, E. J. Albrecht Company, a corporation of the City of Chicago, County of Cook, State of Illinois, against the defendant, State of Illinois, to recover damages caused by the cancellation of road construction contract No. 4549, on State Bond Issue Route No. 46, Section 462-V-B awarded on the 16th day of September, 1931.

The facts in this case are as follows: That after the complainant commenced performance under the said contract it received a notice from the respondent on the 6th day of October 1931, through its Division of Highways, Department of Public Works and Buildings, that no payments could be made for work done under the contract for the reason that the "Prevailing Wage Law" under which the contracts had been let was held to be invalid and void by the courts of the State and that in the event the claimant proceeded to go further under the said contract, it did so at its own peril. After this notice was received complainant's forces and machinery remained idle from October 6th to November 2nd, 1931, thereby necessitating considerable expense for which the claimant asked damages, and the State was then and there so notified.

Thereupon the Division of Highways, Department of Public Works and Buildings, of the State of Illinois, through its Director and Chief Highway Engineer, reached an agreement in settlement of the damages caused as aforesaid, and stipulated to make payment in the sum of $2,365.27. The Attorney General has approved of the said settlement and stipulation,

but the Division of Highways could not pay the claim and therefore recommended that a claim be filed with this court.

As there is no dispute as to the facts presented in the claimant's declaration and the evidence establishes the claimant's right of action, the court is of the opinion that the claim is reasonable and should be paid. The court accordingly awards the claimant the sum of $2,365.27.

(No. 1854—Claimant awarded $11,871.44.)

GEORGE WELCH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1931.

GEORGE WELCH, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*work performed under contract, cancelled before completion because of invalidity of law under which awarded—damages—stipulation—when award may be made.* An award is made herein on authority of *Bishop Construction Co. vs. State*, No. 1845, *ante*.

Mr. JUSTICE ROE delivered the opinion of the court:

This is a suit brought by the claimant, George Welch, an individual of the City of Beloit, County of Rock, State of Wisconsin, against the defendant, State of Illinois, to recover damages caused by the cancellation of road construction contract No. 4524 on State Bond Issue Route No. 63, Section 631-X-I awarded on the 19th day of August, 1931.

The facts in this case are as follows: That after the complainant commenced performance under the said contracts it received a notice from the respondent State of Illinois on the 6th day of October, 1931, through its Division of Highways, Department of Public Works and Buildings that no payments could be made for work done under the contracts for the reason that the "Prevailing Wage Law" under which the contracts had been let was held to be invalid and void by the courts of this State and that in the event the claimant proceeded further under the said contracts, it did so at its own peril. When this notice was received the complainant had already completed work under the contract costing $12,877.44 for which the claimant asked damages, and the State was then and there so notified.

Thereupon the Department of Public Works and Buildings, Division of Highways of the State of Illinois, through its Director and Chief Highway Engineer, after making deductions for cement and cement sacks salvaged, reached an agreement in settlement of the damages caused as aforesaid and stipulated to make payment in the sum of $11,871.44. The Attorney General approved of the said settlement and stipulation; but the Division of Highways could not pay the claim and therefore recommended that a claim be filed with this court.

As there is no dispute as to the facts presented in the claimant's declaration and the evidence establishes the claimant's right of action, the court is of the opinion that the claim is reasonable and should be paid. The court accordingly awards the claimant the sum of $11,871.44.

(No. 1855—Claimant awarded $41,568.99.)

CHICAGO HEIGHTS COAL CO., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1931.

CHICAGO HEIGHTS COAL CO., pro se.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*work performed under contract, cancelled before completion because of invalidity of law under which awarded—damages—stipulation—when award may be made.* An award is made herein on authority of *Bishop Construction Co.* vs. *State*, No. 1845, *ante*.

Mr. JUSTICE ROE delivered the opinion of the court:

This a suit brought by the claimant, Chicago Heights Coal Co., a corporation of the City of Chicago Heights, County of Cook, State of Illinois, against the defendant, State of Illinois, to recover damages caused by the cancellation of road construction contracts No. 4529 and No. 4586 on State Bond Issue Route No. 52, Section 524 awarded on the 3rd day of September, 1931, and Route No. 53, Section 539-X awarded on the 21st day of September, 1931.

The facts in this case are as follows: that after the complainant commenced performance under the said contracts it received notice from the respondent State of Illinois on the

6th day of October, 1931, through its Division of Highways, Department of Public Works and Buildings, that no payments could be made for work done under the contracts for the reason that the "Prevailing Wage Law" under which the contracts had been let was held to be invalid and void by the courts of this State and that in the event the claimant proceeded further under the said contracts, it did so at its own peril. When this notice was received the complainant had already completed work under the contract costing $26,582.55, and thereafter complainant's forces and machinery remained idle from October 6th to November 2nd, 1931 thereby necessitating considerable expense in addition to the cost of work completed, for which the claimant asked damages, and the State was then and there so notified.

Thereupon the Division of Highways, Department of Public Works and Buildings, of the State of Illinois, through its Director and Chief Highway Engineer, after making deductions for cement sacks salvaged, reached an agreement in settlement of the damages caused as aforesaid and stipulated to make payment in the sum of $41,568.99. The Attorney General has approved of the said settlement and stipulation; but the Division of Highways could not pay the claim and therefore recommended that a claim be filed with this court.

As there is no dispute as to the facts presented in the claimant's declaration and the evidence establishes the claimant's right of action, the court is of the opinion that the claim is reasonable and should be paid. The court accordingly awards the claimant the sum of $41,568.99.

(No. 1856—Claimant awarded $442.10.)

GEORGE W. CONDON COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1931.

GEORGE W. CONDON COMPANY, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*work performed under contract, cancelled before completion because of invalidity of law under which awarded—stipulation—when award may be made.* **An award is made herein on authority of Bishop Construction Co., No. 1845, *ante*.**

Mr. JUSTICE THOMAS delivered the opinion of the court:

On September 21, 1931 the Department of Public Works and Buildings awarded a contract to claimant for the construction of Section 47-B on State Bond Issue Route No. 11. Claimant executed the contract and bond required by the department and immediately thereafter commenced performance on the contract. On October 21, 1931, the department notified claimant that payments for work done under the contract could not be made from the general appropriations for such work because the Act under which the contract was awarded had been held invalid by the Supreme Court. The contract was made and the work thereunder performed in good faith, both the department and claimant believing it to be valid.

The department and the Attorney General have stipulated that claimant is entitled to the sum of $442.10 for the work done by it and claimant is therefore awarded that sum in compliance with said stipulation.

(No. 1857—Claimant awarded $809.51.)

DES MOINES ASPHALT PAVING COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1931.

DES MOINES ASPHALT PAVING COMPANY, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*work performed under contract, cancelled before completion, because of invalidity of law under which awarded—damages—stipulation—when award may be made.* **An award is made herein on authority of Bishop Construction Co., No. 1845, *ante.***

Mr. JUSTICE ROE delivered the opinion of the court:

This is a suit brought by the claimant, Des Moines Asphalt Paving Company, a corporation of the City of Des Moines, County of Polk, State of Iowa, against the defendant, State of Illinois, to recover damages caused by the cancellation of road construction contract No. 4568, on State Bond Issue Route No. 89-C, Section 105-B, awarded on the 19th day of September, 1931.

The facts in this case are as follows: That after the complainant commenced performance under the said contracts it received a notice from the respondent on the 6th day of October, 1931, through its Division of Highways, Department of Public Works and Buildings, that no payments could be made for work done under the contracts for the reason that the "Prevailing Wage Law" under which the contracts had been let was held to be invalid and void by the courts of this State and that in the event the claimant proceeded further under the said contracts, it did so at its own peril. Thereafter complainant's forces and machinery remained idle from October 6th to November 2nd, 1931 thereby necessitating considerable expense for which the claimant asked damages, and the State was then and there notified.

Thereupon the Division of Highways, Department of Public Works and Buildings, of the State of Illinois, through its Director and Chief Highway Engineer, reached an agreement in settlement of the damages caused as aforesaid and stipulated to make payment in the sum of $809.51. The Attorney General has approved of the said settlement and stipulation; but the Division of Highways could not pay the claim and therefore recommended that a claim be filed with this court.

As there is no dispute as to the facts presented in the claimant's declaration and the evidence establishes the claimant's right of action, the court is of the opinion that the claim is reasonable and should be paid. The court accordingly awards the claimant the sum of $809.51.

(No. 1858—Claimant awarded $7,909.28.)

JOSEPH KESL & SONS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1931.

JOSEPH KESL & SONS, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*work performed under contract, cancelled before completion, because of invalidity of law under which awarded—damages—stipulation—when award may be made.* An award is made herein on authority of *Bishop Construction Co. vs. State*, No. 1845, *ante*.

Mr. JUSTICE ROE delivered the opinion of the court:

This is a suit brought by the claimant, Joseph Kesl & Sons, a partnership, of the City of Edwardsville, County of Madison and State of Illinois, against the defendant, State of Illinois, to recover damages caused by the cancellation of road construction contracts Nos. 4564 and 4565 on State Bond Issue Route No. 150, Sections 134 and 135, awarded on the 19th day of September, 1931.

The facts in this case are as follows: That after the complainant commenced performance under the said contracts it received a notice from the respondent on the 6th day of October, 1931, through its Division of Highways, Department of Public Works and Buildings, that no payment could be made for work done under the contracts for the *reason* that the "Prevailing Wage Law" under which the contracts had been let was held to be invalid and void by the courts of this State and that in the event the claimant proceeded further under the said contracts, it did so at its own peril. When this notice was received the complainant had already completed work under the contract costing $8,636.28 for which the claimant asked damages, and the State was then and there notified.

Thereupon the Division of Highways, Department of Public Works and Buildings, of the State of Illinois, through its Director and Chief Highway Engineer, after making deductions for high spots and cement sacks, reached an agreement in settlement of the damages caused as aforesaid and stipulated to make payment in the sum of $7,909.28. The Attorney General approved of the said settlement and stipulation; but the Division of Highways could not pay the claim and therefore recommended that a claim be filed with this court.

As there is no dispute as to the facts presented in the claimant's declaration and the evidence establishes the claimant's right of action, the court is of the opinion that the claim is reasonable and should be paid. The court accordingly awards the claimant the sum of $7,909.28.

(No. 1859—Claimant awarded $39,416.10.)

I. D. LAIN COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1931.

I. D. LAIN COMPANY, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*work performed under contract, cancelled before completion, because of invalidity of law under which awarded—damages—stipulation—when award may be made.* An award is made herein on authority of *Bishop Construction Co.* vs. *State*, No. 1845, *ante.*

Mr. JUSTICE THOMAS delivered the opinion of the court:

The claimant and the Department of Public Works and Buildings entered into a written stipulation of facts in this case which stipulation has been approved by the Attorney General for the State of Illinois, and is as follows:

IT IS STIPULATED AND AGREED, by and between the parties hereto, that the fair, just and reasonable value of the work done and the damages incurred by claimant in its performance under the invalid road construction contract on Route No. 19, Section 86-Y, and Route 58, Section 584-Y, awarded on August 24th, 1931, and Route 60, Section 120-Y, awarded on the 31st day of August, 1931, shall properly be considered as amounting to the sum of $64,037.65 as accurately itemized and set forth by "Itemized Statement of Claims" attached hereto and made a part hereof; that of this total sum, $64,037.65, said claimant has received, as partial payment from the said respondent the sum of $24,621.55 paid under three regular payment estimates in accordance with the provisions of Contract No. 4521, Route 19, Section 86-Y, and Contract No. 4523, Route 58, Section 584-Y, as aforesaid, prior to the time when said contracts were held to be invalid by a decision of the Supreme Court of Illinois. Therefore there is due and owing the claimant an unpaid balance of $39,416.10 on his claim for damages as set forth by "Itemized Statement of Claim" attached hereto; that said claimant hereby agrees to accept the sum of $39,416.10 in full and complete settlement for any and all work performed and damages incurred by reason of its performance under said invalid road contract."

Therefore the court recommends that the claimant be allowed an award for the balance due in the sum of $39,416.10 according to the said stipulation.

(No. 1860—Claimant awarded $11,784.53.)

J. C. O'CONNOR & SONS, INCORPORATED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1931.

J. C. O'CONNER & SONS, INCORPORATED, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*work performed under contract, cancelled before completion, because of invalidity of law under which awarded—stipulation—when award may be made.* An award is made herein on authority of Bishop Construction Co., No. 1845, *ante.*

Mr. JUSTICE THOMAS delivered the opinion of the court:

On September 22, 1931, the Department of Public Works and Buildings awarded a contract to claimant for the construction of Section 143-X on State Bond Issue Route No. 104. Claimant executed the contract and bond required by the department and immediately thereafter commenced performance on the contract. On October 21, 1931, the department notified claimant that payment for work done under the contract could not be made from the general appropriation for such work because the Act under which the contract was awarded had been held invalid by the Supreme Court. The contract was made and the work thereunder performed in good faith, both the department and claimant believing it to be valid.

The department and the Attorney General have stipulated that claimant is entitled to the sum of $11,784.53, for the work done by it and claimant is therefore awarded that sum in compliance with said stipulation.

(No. 1861—Claimant awarded $10,956.01.)

MARTIN WUNDERLICH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1931.

MARTIN WUNDERLICH, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*work performed under contract, cancelled before completion, because of invalidity of law under which awarded—stipulation—when award may be made.* An award is made herein on authority of *Bishop Construction Co.* vs. *State*, No. 1845, *ante.*

Mr. JUSTICE THOMAS delivered the opinion of the court:

On September 21, 1931, the Department of Public Works and Buildings awarded a contract to claimant for the construction of Section 101-A, Route No. 124. Claimant executed the contract and bond required by the department and immediately thereafter commenced performance of the contract. On October 21, 1931, the department notified claimant that payments for work done under the contract could not be made from the general appropriation for such work, because the Act under which the contract was awarded had been held invalid by the Supreme Court. The contract was made and the work thereunder performed in good faith, both the department and claimant believing it to be valid.

The department has stipulated and the Attorney General has approved the stipulation that the claimant is entitled to the sum of $10,956.01 for the work and claimant is therefore awarded that sum in compliance with said stipulation.

(No. 1862—Claimant awarded $22,654.61.)

S. J. GROVES & SONS COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1931.

S. J. GROVES & SONS COMPANY, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*work performed under contract, cancelled before completion, because of invalidity of law under which awarded—stipulation—when award may be made.* An award is made herein on authority of *Bishop Construction Co.* vs. *State*, No. 1845, *ante.*

Mr. Justice Thomas delivered the opinion of the court:

On August 19, August 24, and September 12, 1931, the Department of Public Works and Buildings awarded contracts to claimant for the construction of Section G-RB on State Bond Issue Route No. 20; Section 23-RB, Route No. 22; Section 533-H, Route No. 53, and Section 124-A, Route No. 100. Claimant executed the contract and bond required by the department and immediately thereafter commenced performance on the contract. On October 6, 1931, the department notified claimant that payments for work done under the contract would not be made from the general appropriation for such work, because the Act under which the contract was awarded had been held invalid by the Supreme Court. The contract was made and the work thereunder performed in good faith, both the department and claimant believing it to be valid.

The department, with the approval of the Attorney General for the State, has stipulated that claimant is entitled to the sum of $22,654.61 for the work, the additional expense, and rental of equipment by it, and claimant is therefore awarded that sum in compliance with said stipulation.

(No. 1863—Claimant awarded $58,508.27.)

McCarthy Improvement Company, Claimant, *vs.* State of Illinois, Respondent.

Opinion filed December 8, 1931.

McCarthy Improvement Company, pro se.

Oscar E. Carlstrom, Attorney General; Carl I. Dietz, Assistant Attorney General, for respondent.

Contracts—*work performed under contract, cancelled before completion, because of invalidity of law under which awarded—stipulation—when award may be made thereon.* An award is made herein on authority of *Bishop Construction Co. vs. State*, No. 1845, *ante*.

Mr. Justice Roe delivered the opinion of the court:

This is a suit brought by the claimant, McCarthy Improvement Company, a corporation, of the City of Davenport, County of Scott, State of Iowa, against the defendant, State

of Illinois, to recover damages caused by the cancellation of road construction contracts Nos. 4547, 4550, 4551, 4554, 4554, 4588 and 4589, on the State Bond Issue Route No. 85, Sections 103 and 104; Route No. 97, Section 142-A; Route No. 148, Sections 106 and 107, awarded on the 16th day of September, 1931, and Route 77, Sections 105-W and 105-W-1, awarded on the 21st day of September, 1931.

The facts in this case are as follows: That after the complainant commenced performance under the said contracts it received a notice from the respondent on the 6th day of October, 1931, through its Division of Highways, Department of Public Works and Buildings, that no payments could be made for work done under the contracts for the reason that the "Prevailing Wage Law" under which the contracts had been let was held to be invalid and void by the courts of this State and that in the event the claimant proceeded further under the said contracts, it did so at its own peril. When this notice was received the complainant had already completed work under the contract costing $12,097.25, and thereafter complainant's forces and machinery remained idle from October 6th to November 2nd, 1931, thereby necessitating considerable expense in addition to the cost of work completed, for which the claimant asked damages, and the State was then and there so notified.

Thereupon, the Division of Highways, Department of Public Works and Buildings, of the State of Illinois, through its Director, and Chief Highway Engineer, after asking deductions for cement sacks salvaged reached an agreement in settlement of the damages caused as aforesaid and stipulated to make payment in the sum of $58,508.27. The Attorney General has approved of the said settlement and stipulation but the Division of Highways could not pay the claim and therefore recommended that a claim be filed with this court.

As there is no dispute as to the facts presented in the claimant's declaration and the evidence establishes the claimant's right of action, the court is of the opinion that the claim is reasonable and should be paid. The court accordingly awards the claimant the sum of $58,508.27.

(No. 1864—Claimant awarded $21,023.34.)

DUFFIN IRON COMPANY, Claimant, *vs.* STATE OF ILLINOIS, *Respondent.*

Opinion filed December 8, 1931.

DUFFIN IRON COMPANY, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*work performed and materials furnished under contract, cancelled before completion, because of invalidity of law under which awarded—damages—stipulation—when award may be made.* An award is made herein on authority of *Bishop Construction Co. vs. State*, No. 1845, *ante.*

Mr. JUSTICE THOMAS delivered the opinion of the court:

On September 12, 1931, the Department of Public Works and Buildings awarded a contract to claimant for the construction of Section 462-V. C. on State Bond Issue Route No. 46. Claimant executed the contract and bond required by the Department and immediately thereafter commenced performance on the contract. On October 6, 1931, the department notified claimant that payments for work done under the contract could not be made from the general appropriation for such work because the Act under which the contract was awarded had been held invalid by the Supreme Court. The contract was made and the work thereunder performed in good faith, both the department and claimant believing it to be valid.

The department, with the Attorney General's approval, has stipulated that claimant is entitled to the sum of $21,023.34, for the rental on equipment and additional expense incurred by it, and claimant is therefore awarded that sum in compliance with said stipulation.

(No. 1693—Claim denied.)

J. R. McDONALD, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 12, 1932.

PERSONAL INJURY—*driving upon highway in course of construction—when no award will be made.* Where one is familiar with a road in course of construction and drives upon same, especially in night-time, he will be deemed to do so at his own risk and if injured by running into an unlighted barricade thereon, no award will be made.

Per Curiam:

This is a claim filed to recover for alleged damages occasioned by claimant running into an unlighted barricade on the evening of November 11, 1930, over a new strip of road while it was still under construction on Route 18, near the city of Aurora, Illinois.

It appears from all the evidence that the claimant was familiar with the road in question and ought to know the hazards that he might meet, and we are of the opinion that the claimant was driving at his own risk, the road being in course of construction at which time traveling should be avoided at least at night time.

Therefore, it is recommended that the claim be disallowed.

(No. 1710—Claim denied.)

RELIABLE COAL & MINING CO., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 12, 1932.

POMEROY & MARTIN, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*when no award will be made for.* Where property damage results from the negligence of a State employee, no award will be made for such damage.

NEGLIGENCE—*State not liable for negligence of its employees.* No government is liable for the negligence of its employees in the absence of a statute making it liable for such negligence.

MR. JUSTICE THOMAS delivered the opinion of the court:

This claim is for $501.75 for an automobile wrecked in a collision near Hanna City on November 8, 1930. The automobile of claimant was being driven by one of its salesmen on State Bond Issue Route No. 8 and collided with a truck and trailer being driven by an employee of the State Highway Department. The declaration alleges and the evidence tends to show the collision was caused by the negligence of the driver of the truck, but in the view we take of the case it will not be necessary to discuss the weight of the testimony.

The claim is predicted upon the negligence of the agent or servant of the State, and unless the State is liable for the

negligence of its agents no award can be made. It is a rule of almost universal application that no government is liable for the negligence, lacks or misfeasance of its officers and agents in the absence of a statute making it so liable. This principle has been announced by this court in many of its decisions, and also by our Supreme Court and the Supreme Court of the United States. (*Gibbons* vs. *United States*, 8 Wal. 269; *United States* vs. *Kirkpatrick*, 9 *Wheaton* 720; *Kinnare* vs. *City of Chicago*, 171 Ill. 332; *Jorgensen* vs. *State*, 2 Ct. C. 134; *Watkins* vs. *State*, 6 Ct. C.) Many other cases from the Supreme Court of the United States, our own Supreme Court and this court announcing this rule of law could be cited but we deem the foregoing sufficient. There is no statute making the State liable for the negligence of its employees, and it follows that no award can be made in this case.

If the damages complained of were caused by the negligence of the driver of the truck, claimant is not without remedy. It can sue and recover from the driver the damages caused by his negligent conduct.

The claim is denied and the case dismissed.

(No. 1767—Claim denied.)

UNION BANK OF CHICAGO, ADMINISTRATOR OF THE ESTATE OF LEON JOHNSON, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 12, 1932.

SAMUEL J. SPIEGEL, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*negligence of agent of State.* The State is not liable for the torts or negligence of its agents or servants.

SAME—*pleading—when award denied and case dismissed.* Where it is alleged in the declaration that the South Park Commissioners were agents of the State and that their negligence caused the injury complained of, a cause of action is not stated and the claim will be denied and the case dismissed.

Mr. JUSTICE THOMAS delivered the opinion of the court:

The substance of the declaration in this case is that claimant's intestate, Leon Johnson, a boy eleven years old, was drowned in a lagoon in Washington Park, on April 20, 1930.

The declaration also charges the South Park Commissioners were agents of the State and that the death of Johnson was caused by their negligence and carelessness, and asks $10,000.00 damages.

The South Park Commissioners constitute a municipal corporation and have the control and management of Washington Park. (*The People* vs. *Chicago Motor Bus Co.*, 295 Ill. 486.) Such a municipal corporation has a dual character, the one public the other private. In the exercise of its public or governmental functions no liability attaches to it under the common law and it is not liable for the nonuser or misuser of its powers. (*Stein* vs. *West Chicago Park Commissioners*, 247 Ill. App. 479.) A municipality created for governmental purposes is not liable for damages caused by the negligence of its agents unless such liability is expressly provided by statute. (*Linstrom* vs. *City of Chicago*, 33 Ill. 144.)

If the Park Commissioners were mere agents of the State, as charged in the declaration, it follows as a matter of course that there is no liability on the part of the State for damages caused by their negligence, as the State is never liable for the torts or negligence of its agents. (*Kinnare* vs. *City of Chicago*, 171 Ill. 332.) As the declaration does not state a cause of action against the State the case must be dismissed.

The claim is therefore denied and the case dismissed.

(No. 1778—Claimant awarded $2,500.00.)

LILLIE MILLER, ADMINISTRATRIX OF THE ESTATE OF ADAM MILLER, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 12, 1932.

CARL E. ROBINSON, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DILTZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made.* Where employee of State sustains accidental personal injuries, causing death, arising out of and in course of employment, while engaged in extra hazardous employment, an award may be made under Workmen's Compensation Act.

Mr. JUSTICE ROE delivered the opinion of the court:

The claimant, Lillie Miller, administratrix of the estate of her husband, Adam Miller, represents that the deceased

was regularly employed as a fireman for more than fifteen years at the Illinois State School for the Deaf at Jacksonville. Although classified as a fireman at a salary of One Hundred and Thirty Dollars per month the deceased was also assigned to the duties of an assistant steam fitter and plumber.

On December 4, 1930, he was assisting one Robert Smith, a steam fitter and plumber, in assembling and installing a new steam boiler in the basement of a large frame building used as an Isolation Hospital at the said school. Standing on a box or crate twenty inches from the floor and using a large Stilson wrench the deceased was engaged in connecting and fitting pipes to the header of the boiler when in some manner he lost his balance and fell backward. In falling, the back of his head struck some iron fittings piled on the concrete floor, causing a severe skull fracture and almost instantaneous death.

The evidence showed that the deceased was a man of good habits, who used neither tobacco nor intoxicants and was a steady worker; that he was in good health prior to his injuries; that he was 69 years of age; that he left surviving him his wife and one married son.

The claimant asks for damages of $10,000.00 and bases her claim for compensation on the provisions of the Workmen's Compensation Act. Section 3 of the said Act, as amended in 1917, recites that "the provisions of this Act hereinafter following shall apply automatically and without election to the State * * * in any department of the following enterprises or business which are declared to be extra-hazardous, namely, the erection, maintaining, removing, remodeling, altering or demolishing of any structure, except as provided in sub-paragraph 8 of this section." Section 6 of the Act of 1917 creating the Court of Claims and prescribing its powers and duties says: "The Court of Claims shall have power to hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by any employee of the State, such determination to be made in accordance with the rules prescribed in the Act commonly called the Workmen's Compensation Act, the Industrial Commission being hereby relieved of any duty relative thereto."

We believe the deceased was injured while engaged in one of the extra-hazardous occupations enumerated by Section 3 of the said Act and his death resulted from and in the course of his employment. We further believe that there can be no doubt that he was engaged in the erection and maintaining of a structure within the meaning of Section 3 of the Workmen's Compensation Act.

The Court of Claims has jurisdiction to determine whether the claimant is entitled to compensation and if so the amount she should be allowed. The Attorney General comes and admits the facts as stated and the law as hereinbefore construed.

It follows from the above facts and conclusions that the claimant is entitled to receive such compensation under the terms of the Workmen's Compensation Act as this court shall deem she is entitled to receive. It is therefore ordered that claimant be and is awarded the sum of $2,500.00 in full compensation for the injury sustained.

(No. 1782—Claim denied.)

JAMES HICKEY, JR., BY HIS FATHER AND NEXT FRIEND, JAMES J. HICKEY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 12, 1932.

HECTOR A. BROUILLET, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*when State not liable.* **The principle involved herein was fully discussed and decided in *Perkins, Fellows and Hamilton*, 4 Court of Claims Reports 197, and subsequent cases in this Court and the opinions in same are decisive in this case.**

Mr. JUSTICE ROE delivered the opinion of the court:

The claimant, James Hickey, Jr., by his father and next friend, James J. Hickey, presents a claim to this court for damages in the amount of Ten Thousand Dollars because of an injury received by him on August 4, 1930. It appears that on the above day the said James Hickey, Jr., who is fourteen years of age, was in line waiting to enter a bathing pool main-

tained at Garfield Park by the West Park Commission in the City of Chicago. While he was thus in line someone threw a very small article at one Robert Anderson, a policeman in attendance at the pool, whereupon, several of the boys ran away and the said policeman chased those whom he suspected. James Hickey, Jr., was one of the boys who ran away laughing and as he did so the policeman, who had evidently lost his temper, shot the Hickey boy in the chest and the bullet still remains in one of his lungs due to the dangerous consequences of a possible operation.

There seems to be no doubt that this boy received a very serious injury and suffered physically and mentally because of this unfortunate occurrence.

The Attorney General has filed a demurrer on behalf of the State of Illinois setting up the plea that the Court of Claims has no jurisdiction in this case. It is therein contended that the West Chicago Park Board of Commissioners is a Municipal Corporation with the inherent power to sue and be sued and therefore this court has no jurisdiction over claims involving an employee of the said park board.

The claimants take issue with the contention.

We believe that the rule laid down and the law expressed in the case of *Perkins, Fellows and Hamilton* vs. *State of Illinois*, Volume 4, Page 197, Illinois Court of Claims Reports is correct. It is there clearly and concisely decided that "the Court of Claims has no jurisdiction over suits against Municipal Corporations." The Supreme Court of this State has decided that the West Park Board of Commissioners is a Municipal Corporation created by an Act of the Legislature in February, 1869.

Although the question is not raised by the State in this case we believe that a governmental function was being exercised and consequently no liability would attach because of the tort of an officer, agent or employee.

As a matter of law the demurrer filed by the Attorney General in behalf of the State of Illinois is sustained and the case dismissed.

(No. 1594—Claimant awarded $360.00.)

ILLINOIS STOKER COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 10, 1930.
Rehearing granted November 12, 1930.
Opinion on Rehearing filed March 9, 1932.

GREEN & VERLIE, for claimant.

OSCAR E. CARLSTROM, Attorney General, for respondent.

CONTRACTS—*when State not bound by contract made by State officer.* Under section 30 of the Act in relation to State finance no officer has the right to contract any indebtedness on behalf of the State in excess of the *amount of money* appropriated. *Individual Towel & Cabinet Service Co., et al.*, 6 Court of Claims Reports 106, adhered to.

REHEARING—*when may be granted.* Where case is decided on grounds that appropriation made for claim was exceeded and it appears that same was not a rehearing may be granted.

EQUITY AND GOOD CONSCIENCE—*when award may be made.* Where it appears that necessary repairs were made on heating apparatus in State institution on order of president thereof and that at the time, there was sufficient money in the appropriation made therefor and proper department has approved claim therefor, an award may be made on the grounds of equity and good conscience, after appropriation has been exhausted.

Mr. CHIEF JUSTICE CLARITY delivered the opinion of the court:

This is a claim brought to recover $360.00 for furnishing repairs to a certain stoker located upon the premises of the Illinois State Normal University at Normal, Illinois.

It appears that the president of this institution made arrangements for the repairs in question, that the repairs were installed and that the price claimed was reasonable, although there were certain issues as to whether or not certain general contractor should not be held liable for the repairs in question; however, that is not an issue determined by this court.

The court takes the same position as was taken in the case of the Illinois Bell Telephone Company, No. 1558 and the Individual Towel and Cabinet Service Company, No. 1547, in that the appropriation made by the General Assembly for the repair and maintenance as is made to the institution in this case, should be the guide in the matter of expenditures. The Constitution of this State will not permit this court, or any other legal body to grant relief other than that permitted by the Legislature. The appropriation was made for repair

and re-building and all repairs should be made through this appropriation. If any other rule should be adopted, no limitations would be considered in the matter of expenditures by any department of the State.

In other words, this institution and other institutions of the State should live within the means provided by the Legislature, the same as an employee would be required to live within the salary provided during the course of employment. An employee cannot incur extra expenses or extra liability beyond the salary received, but look forward and provide for the payment of necessary expense from the emoluments to be received.

The court is of the opinion that claimant furnished material and performed services as claimed without authority. This might appear unjust, but it is assumed that all persons must know the requirements of the law and assume all burdens imposed by the law in their dealings with the State of Illinois, the same as a private corporation, or an individual. Therefore, the claim is disallowed.

A petition for rehearing having been granted by the court, the following opinion was rendered on rehearing:

Mr. CHIEF JUSTICE CLARITY delivered the opinion of the court:

The claimant asks the sum of Three Hundred and Sixty ($360.00) Dollars as the amount due for furnishing lower skids for repairs of a certain stoked located on the premises of the Illinois State Normal University, Normal, Illinois.

It appears that the Division of Architects and Engineering have approved said claim as being just and reasonable as was ordered by the president of the University.

The court heretofore disallowed the claim and thereafter granted a rehearing with the thought in mind largely as to the necessity of proper heating facilities. When the claim was disallowed the court had in mind the fact that the appropriation made for this purpose was exceeded. However, it appears now that when the contract was made for these repairs that there was sufficient funds left in the appropriation to care for same. However, the court wishes to have it understood that the first opinion filed contains principles that should be followed in that all the departments of the State should carry out their program within the means provided

by the Legislature and that any petition filed in this court for relief should be from an equitable and good conscience viewpoint.

This claim appears to be within the idea sought to be conveyed by the above viewpoint and therefore this court recommends that the claimant be allowed the sum of Three Hundred and Sixty ($360.00) Dollars.

(No. 1604—Claimant awarded $901.74.)

BATES VALVE BAG CORPORATION, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 9, 1932.

BROWN, HAY & STEPHENS, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

FRANCHISE TAX—*payment of under mistake of fact—when award will be made.* Where it is undisputed that franchise tax was paid under mistake of fact an award will be made upon the recommendation of the Attorney General for the amount erroneously paid.

Opinion written by Mr. JUSTICE THOMAS:

The Bates Valve Bag Corporation, a Delaware Corporation, was incorporated under the laws of the State of Delaware, on June 9, 1927, and admitted to do business in the State of Illinois, as a foreign corporation on July 5, 1927. On or about March 7, 1929, all of the property and assets of the said Bates Valve Bag Corporation, of Delaware were purchased by Bates Valve Bag Corporation, a corporation incorporated under the laws of the State of New Jersey, on February 28, 1929. Subsequent to said purchase on March 7, 1929, the said Bates Valve Bag Corporation, of Delaware, executed an affidavit of withdrawal as a foreign corporation from the State of Illinois, and filed the same with the Secretary of State of the State of Illinois, on March 25, 1929, which was accepted, and thereupon the Bates Valve Bag Corporation, of Delaware, ceased to possess a certificate of authority to do business in the State of Illinois. On March 5, 1929, the Bates Valve Bag Corporation, of New Jersey, filed an application for admission to do business in Illinois, as a foreign corporation, in the office of the Secretary of State,

and it was duly licensed to do business in the State of Illinois, on March 25, 1929. At that time it paid to the Secretary of State, the sum of $1,430.37, as an initial fee, and the sum of $1,907.16, as a franchise tax. The franchise tax was for the balance of the year ending June 30, 1929 and the full period of the year beginning July 1, 1929, and ending June 30, 1930, this franchise tax being a tax equal to one and one-third the annual franchise tax due from it for the privilege of doing business in Illinois.

On May 18, 1929, and again on June 1, 1929, the Secretary of State, sent out notices to the Bates Valve Bag Corporation, at the former Illinois address, of the Bates Valve Bag Corporation, of Delaware, notifying it that it had not paids its franchise tax of $901.74, based upon its annual report filed with the Secretary of State on February 21, 1929, prior to its withdrawal from doing business in Illinois. The notices sent out by the Secretary of State, was received by the Bates Valve Bag Corporation, of New Jersey. The officials of the Bates Valve Bag Corporation, of New Jersey, on receiving the notices issued a check for $901.74, in payment of the franchise tax, and sent it to Secretary of State, of Illinois. The mistake was not discovered by the Bates Valve Bag Corporation, of New Jersey, until the books of the corporation were audited several months thereafter, and until after the Secretary of State of Illinois, had turned the money over to the State Treasurer.

It is admitted by the Attorney General for the State, that at the time the Secretary of State sent out the notices to the Bates Valve Bag Corporation, for the payment of the franchise tax, that there was no franchise tax due or owing to the State of Illinois, from the Bates Valve Bag Corporation, of Delaware or the Bates Valve Bag Corporation, of New Jersey, and that if the Secretary of State had not made the mistake of the first instance by sending out the notices to the Bates Valve Bag Corporation, when there was no franchise tax due and owing, the $901.74 would not have been paid by the Complainant. The Attorney General, in his argument admits that the payment of $901.74 made by the Claimant was a mistake of fact, and recommends that Claimant be awarded a refund of the corporate franchise tax of $901.74. Therefore, on the recommendation of the Attorney General an award of $901.74 is allowed claimant.

(No. 1697—Claimant awarded $3,750.00.)

ELSIE MILLIGAN, A WIDOW, ETC., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 9, 1932.

FRANK E. LEMON AND JOHN BEDINGER, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made.* Where claimant's intestate received injuries, arising out of and in course of employment by the State in an extra hazardous employment an award will be made under the Workmen's Compensation Act.

Mr. JUSTICE ROE delivered the opinion of the court:

Thomas Edward Milligan was employed on October 14, 1930, as a carpenter at the Kankakee State Hospital. On November 4, 1930, while engaged with other workmen in re-roofing Cottage Two South, one of the buildings of the said State institution, he fell from a scaffold upon concrete steps below, a distance of approximately twenty-three feet, and thereby received severe injuries from which he died two days later.

This claim is filed by Elsie Milligan, the widow of the deceased for damages under the Workmen's Compensation Act of 1911. The Attorney General, in his statement, agrees that the facts as set forth in the abstract of testimony and the statement filed by the attorneys for the claimant are substantially correct. The deceased was fifty-one years of age at the time of the accident and his family consisted of the claimant and one minor child, Mary Alberta, whose age was eight years at the time of her father's death. The deceased was receiving Ten Dollars and 40/100 Dollars ($10.40) per day as wages from the respondent and his earnings during the previous year were about One Thousand Dollars ($1,000.00).

It has been the rule of this court to consider the employees of the State of Illinois who are injured in the source of their employment, in the same manner as if they were employed by private individuals. This court has jurisdiction not only to determine whether the claimant is entitled to such compensation, but also to determine the amount that should be allowed.

It is manifest from the provisions of the statute that the employment of the deceased as a carpenter by the respondent for the purpose of remodeling or altering a State structure or building, is of such a nature as properly comes under the Classification of the Workmen's Compensation Act.

We believe that the liability of the respondent is clearly established under the above act and taking into consideration all the circumstances, it is ordered that claimant be and she is hereby awarded the sum of Three Thousand and Seven Hundred Fifty Dollars ($3,750.00), which includes Three Hundred and Fifty Dollars ($350.00), for Mary Alberta, which is statutory allowance for a minor child under the age of sixteen years under the above Act, and the court recommends the payment of the total amount of Three Thousand Seven Hundred and Fifty Dollars in full compensation for the injury sustained.

(No. 1792—Claim dismissed.)

ERNEST KUMPF, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 9, 1932.

HENRY MANSFIELD AND DAVID J. COWAN, for claimant.

OSCAR E. CARLSTROM, Attorney General, for respondent.

DISMISSAL—*when case will be dismissed upon motion of claimant.* **Where claimant moves to dismiss the suit for the reason that the claim has been paid case will be dismissed.**

Mr. JUSTICE THOMAS delivered the opinion of the court:

On March 8, 1932, comes Mansfield and Cowan, attorneys for claimant and file their written motion to dismiss suit as the claimant has been paid in full.

Motion granted and suit dismissed.

(No. 1661—Claimant awarded $56.10.)

THE CITY OF LITCHFIELD, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 3, 1932.

H. B. TUNNELL, City Attorney, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*when award may be made.* Upon recommendation of State department responsible for property damage, an award may be made therefor.

Mr. JUSTICE ROE delivered the opinion of the court:

This is a claim for damages by the City of Litchfield, Illinois in the sum of Fifty-six and 10/100 Dollars ($56.10).

On September 30, 1929, a State highway motor truck operated by Mr. Howard Billiter, an employee of the Division of Highways, drove into and crashed against an ornamental fluted column electric light post at and near the intersection of Edwards and North State Street in the City of Litchfield. The said Howard Billiter was in the service of the respondent at the time, hauling material for the construction of a portion of State Bond Issue Route No. 126 near the said City of Litchfield. Mr. E. B. Blough, superintendent of construction, who was in charge of operations at this time and place, reported this accident to Mr. Frank T. Sheets, Chief Highway Engineer, under date of November 14, 1930, as follows:

"This is in answer to your letter of October 20th, 1930, inquiring as to the correctness of the facts as set forth in the declaration of Court of Claims case No. 1661 of the January term in the case of The City of Litchfield versus the State of Illinois, Division of Highways.

It is true that one lamp post and fittings was demolished by being hit by one of my trucks. Some of the other allegations are not correct. The brakes on the truck were in fair condition. The driver was not careless or driving improperly.

The accident was caused by a car backing out of a driveway into the path of the truck and in order to avoid hitting the car, the truck driver pulled his truck up on the curb and hit the lamp post.

It is my opinion that the damages asked, $56.10, are reasonable and should be paid."

In view of the statement above made by the Superintendent of Construction in the Division of Highways and on his recommendation and also because the bill attached to the claim shows the cost of the repairs for the damage to said lamp post at $56.10, we recommend the payment to the claimant of the sum of Fifty-six and 10/100 Dollars ($56.10).

(No. 1684—Claim denied.)

PETER McELYEA, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 3, 1932.

J. E. CARR, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*when claim for barred by Statute of Limitations.* Where claimant, while an inmate of penal institution sustained personal injuries and files claim for same after Statute of Limitations has expired, demurrer of Attorney General will be sustained, claim disallowed and case dismissed.

PENAL INSTITUTION, INMATE OF—*personal rights.* A prisoner serving a sentence has the right to sue or be sued in the courts of this State and does not by reason of such imprisonment lose his personal rights and has full power to file a claim in this Court while so confined.

Mr. JUSTICE ROE delivered the opinion of the court:

On the 16th day of September, 1922, claimant alleges that he was injured while a prisoner in the Southern Illinois Penitentiary at Menard, Illinois. As a convict he had been working on the above day in a stone quarry outside the prison walls, and was returning to the prison as a passenger on a truck driven by a fellow convict. Upon entering the prison the gate had been opened to admit the truck failed to catch and swung back upon the truck in which claimant was riding on the seat beside the driver. As the gate swung back it caught the claimant's right foot between the bars and he was jerked from his seat. The flesh of the claimant's right leg was thereby stripped off above the ankle near the knee joint and the bones of this leg were broken and crushed. He was taken to the prison hospital where the right leg was amputated below the knee.

Claimant remained as a prisoner in said institution until about the first of July, 1930, when he was released on parole.

The above facts are set forth in the declaration. To this declaration the Attorney General has filed a demurrer.

The declaration filed by claimant alleges that he was not able to file his petition within five years from the date of his injury because he was confined as a convict in the said penitentiary and therefore not in a position to enforce his rights.

The law of this State gives unto a prisoner serving a sentence in any penal institution the right to sue or be sued in

the courts of this State during the period of such confinement. A convict does not lose his personal rights because of his imprisonment although he is deprived by law of certain rights of citizenship. Therefore, as he possessed said personal rights the claimant was entitled, able and free to exercise them, even though he was confined in the penitentiary. He could have brought his cause of action any time after September 16, 1922 and should have filed his claim within five years from the date of his injury. Inasmuch as seven years elapsed after his right of action accrued before he filed his claim the statute of limitations applying to actions before this court applies in this case.

Section 10 of the Act creating the Court of Claims provides that every claim against the State cognizable by the court shall be forever barred unless it is filed with the secretary of the court within five years after it first accrues. It appears on the face of the declaration that this claim was not filed within the time required by the statute.

The claimant's right of action is therefore barred and the demurrer filed by the Attorney General in behalf of the State of Illinois is sustained, the claim disallowed and the case dismissed.

(No. 1780—Claimant awarded $2,000.00.)

CHARLES H. TIBBS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 3, 1932.

PERSONAL INJURY—*when award may be made for injuries sustained by a State employee—equity and good conscience.* Where the evidence shows that claimant received serious and permanent injuries, for which he was in no way responsible, while in the performance of his duties as an assistant gardener of the Peoria State Hospital, caused by being attacked by an inmate of said hospital, an award may be made on the grounds of equity and good conscience.

WORKMEN'S COMPENSATION ACT—*when applicable to employees of State.* Workmen's Compensation Act applies only to such occupations as are clearly classified as extra hazardous.

SAME—*occupation not extra hazardous.* Occupation of assistant gardener at State hospital held not to be extra hazardous.

SAME—*State not liable unless injury within.* Where a personal injury sustained by a State employee does not come within the provisions of the Workmen's Compensation Act, there is no other statute making the State liable.

Mr. JUSTICE ROE delivered the opinion of the court:

Charles H. Tibbs, the claimant, has been employed at the Peoria State Hospital for more than twenty-nine years as an attendant and as an assistant in farm and garden work at this institution. The classification under which he received his pay was that of a farm laborer.

The Peoria State Hospital is an institution for the care and custody of the insane maintained by the State of Illinois at South Bartonville, Illinois. The institution has some seventy acres of land set aside as a farm and garden upon which vegetables for the entire hospital are raised. The work in the garden is carried on largely by inmates who have been committed to the said institution who have progressed in their treatment so that they may be trusted out of doors. They are required to work partly for the purpose of such treatment and partly as an economic convenience to the institution. It was the duty of the claimant as assistant gardener to instruct and supervise the inmates assigned to this garden work.

On June 28, 1930, while the claimant was directly and assisting in such garden work on a piece of ground on the right of way of a railroad adjacent to the seventy acre garden tract, he was severely injured by one of the inmates and it is for this injury that he claims damages from the State of Illinois. While claimant was bending over showing one of the inmates how to hoe parsnips, another inmate came up from behind, and struck the client on the head, shoulders and back with an eight and one-half inch metal hoe attached to a five and one-half foot handle. The blows were so violent that claimant was rendered unconscious, the inmate who struck him being a stout man weighing about one hundred fifty to one hundred sixty pounds.

The Attorney General agrees that the statement filed by the claimant herein clearly sets forth the facts as to claimant's employment and the circumstances of the accident. These facts are admitted. However, there is not unaminity as to the results of the injury.

Claimant asserts that the first stroke of the hoe, a sharp instrument, contacted claimant's spinal column at the small of the back while he was bending over; that further strokes came in contact with the claimant's head and shoulders and

other parts of the body, thereby prostrating and physically incapacitating claimant. He further asserts that he was removed to the hospital in the said institution and that thereafter he experienced great pain and suffering and is still unable to walk without the aid of a cane and is not able to do manual labor. The claimant also asserts that he is suffering from a permanent and total disability resulting from an injury to the base of the spine and sareroillese joints caused by traums received when attacked. The respondent admits the injury was serious but contends that the injury has resulted in a partial total disability of approximately fifty per cent.

The claimant's employment and the circumstances surrounding the cause of the injury are admitted by the respondent, and the results of the injury have been set forth in the depositions and have been ably discussed by both sides, therefore the important question to be determined by this court is one of liability.

The Attorney General seems inclined to the opinion that the duties appurtenant to an attendant at a State welfare institution, where such attendant or gardner has direct control or supervision of insane inmates, is of such a nature as properly classified as extra-hazardous under the Workmen's Compensation Act.

This court has consistently held that when this Act is applied to State employees, it shall apply only to such occupations as are clearly classified by Statute as extra-hazardous, and therefore we are constrained to find that this case does not come within and under this Act. The provisions of the Act declare certain enterprises or businesses only to be extra-hazardous and enumerates them. The only paragraph which might be construed as applicable to the present case is Paragraph 7½ which refers to an "enterprise in which sharp-edged cutting tools, grinders or implements are used." But later on the Act, in Paragraph 8, provides that "nothing contained herein shall be construed to apply to any work, employment or operations done, had or conducted by farmers and others engaged in farming, tillage of the soil * * * or to any work done on a farm or country place, no matter what kind of work or service is being done or rendered." It is therefore the opinion of this court that the foregoing pro-

vision is conclusive that this claimant's occupation cannot be considered as extra-hazardous and does not come under or within the Workmen's Compensation Act.

It has been the rule of this court to endeavor to treat the employees of the State of Illinois in the same manner as if they were employed by private individuals. *Coons* vs. *State of Illinois*, No. 1175, Vol. 5, page 385, Court of Claims Reports.

Under Section 6, clause 4, of the Act creating the Court of Claims, it provides that this court shall have the power to hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, *ex contractu* and *ex delicto*, which the State as a Sovereign Commonwealth should in equity and good conscience discharge and pay.

In the case of *Stoddard, etc.* vs. *State of Illinois*, Nos. 1066-1067, Vol. 6, page 29, Court of Claims Reports, this court says:

"It is clear from this language that the Legislature intended that all claims allowed against the State should be based upon either a legal or equitable right. This question has been before the Court a number of times."

This court has held that where the injury does not come within the provisions of the Workmen's Compensation Act, there is no other statute making the State liable for injuries suffered by employees. *Hoenig* vs. *State of Illinois*, No. 1705, Vol. 6, page 562, Court of Claims Reports. While this is the strict rule of law applied by this court, the statute contemplated that the Court of Claims, when it deems that the facts and circumstances justify it in so doing may consider the case from a broader viewpoint than the strict rules of law allow, and consider the case in the light of commonsense and fair dealing as a matter of equity and good conscience. The statute thereby contemplated that situations might arise where employees of the State should not be dealt with under the strict rules of the law and left the application of this principle of commonsense and fair dealing to the wisdom of the court. This court has therefore set a definite standard in this regard whereby litigants before the court may proceed and be guided.

Time after time where there is no legal liability on the part of the State for damages sustained by claimants, as a matter

of equity and good conscience awards have been made under Section 6, Clause 4.

Stanley Stachowick vs. *State of Illinois*, No. 683, Vol. 5, page 276, Court of Claims Reports;
Brennan Packing Company vs. *State of Illinois*, No. 735, Vol. 5, page 137, Court of Claims Reports;
Wright vs. *State of Illinois*, No. 824, Vol. 5, page 161, Court of Claims Reports;
Stack vs. *State of Illinois*, No. 875, Vol. 5, page 180, Court of Claims Reports;
Carroll vs. *State of Illinois*, No. 1149, Vol. 5, page 422, Court of Claims Reports;
Clary vs. *State of Illinois*, No. 1179, Vol. 5, page 386, Court of Claims Reports;
William J. Brennan vs. *State of Illinois*, No. 1148, Vol. 5, page 420, Court of Claims Reports;
DeSale vs. *State of Illinois*, No. 1053, Vol. 6, page 172, Court of Claims Reports;
Hanson vs. *State of Illinois*, No. 1452, Vol. 6, page 275, Court of Claims Reports;
Love vs. *State of Illinois*, No. 1383, Vol. 6, page 183, Court of Claims Reports;

In considering the evidence in the case before the court, we find that the claimant was required to work with an inmate who had previously attacked and seriously injured another employee at the same institution. The evidence further shows that the care and treatment of the inmates was determined by persons known as supervisors. The inmates detailed to assist claimant in the garden were chosen by these supervisors and the evidence also shows that the inmate who attacked the claimant had been troublesome and more or less of a menace since his former attack upon an employee, but because of his changed appearance he was not recognized by the claimant. Although claimant asserts that he did not recognize his assailant as one known to him as troublesome, he should have been on the alert always when dealing with insane persons and this court believes that all persons who deal with the insane should ever be on their guard and should exercise more than ordinary care for their own safety.

Nevertheless, in equity and good conscience, we believe that a trusted employee, sixty-two years of age, married and supporting a wife, should be reimbursed for this injury in-

flicted by an insane person and received while the claimant was on duty.

The Court of Claims has jurisdiction to determine whether the claimant is entitled to compensation and if so, the amount he should be allowed. Quoting from the decision in the case of *Michael W. Wright* vs. *State of Illinois*, No. 824, Vol. 5, page 161, Court of Claims Reports, the language there used is applicable here:

"There is no doubt in the minds of the Court that the claimant is in a very bad physical condition, and from the evidence we must conclude it was due to the injuries, both external and internal, he received at the time of the accident that caused the condition. He testifies that he is practically totally disabled."

The evidence shows that claimant has been very kindly treated by the State and has received medical and hospital care free. Therefore, taking into consideration all these facts, we believe the circumstances warrant the finding that in equity and good conscience the claimant be and he is hereby awarded the sum of Two Thousand Dollars ($2,000.00) and we recommend that he be paid this amount.

(No. 1650—Claim denied.)

ILLINOIS STEEL BRIDGE COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 14, 1932.

DOYLE, SAMPSON & GIFFIN, C. TERRY LINDER, AND ALFRED F. NEWKIRK, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*function of court.* The function of a court is to enforce contracts when made between parties competent to contract and free to do so, when such contracts do not conflict with any rule of law or the declared public policy of the State, regardless of the harshness of the terms thereof.

SAME—*construction.* Where it is clearly evident from a contract that the purposes of certain provisions thereof were to limit the compensation which a party should have, to the price fixed and agreed in said contract, there is no legal liability for an additional amount.

SAME—*when extra compensation will not be allowed under.* Where claimant voluntarily signs a contract containing provision that State shall not be liable for delays he is bound by it and such provision bars any claim for damages sustained on account of delays.

CONSTITUTIONAL LAW—*section 19 of article 4 of the Constitution is mandatory and binding.* Section 19 of article 4 of the Constitution providing that "the General Assembly shall never grant or authorize extra compensation, fee, or allowance to any public officer, agent, servant or contractor after service has been rendered or a contract made", etc., is mandatory and binding upon the legislature and all of the courts of the State.

Mr. JUSTICE THOMAS delivered the opinion of the court:

On October 25, 1926, claimant entered into a contract with the State to construct the superstructure of a steel bridge over the Illinois River near the City of LaSalle. On the 23rd of October the State had contracted with Stresenreuter Bros. to construct the substructure or piers of the same bridge. The contract for the piers provided that they should be completed within 13 months after notice to begin work had been given the contractor and the contract with claimant that its contract should be completed within 20 months after such notice had been given to it. At the time claimant entered into the contract for the erection of the superstructure of the bridge it knew of the contract for the construction of the piers by Stresenreuter Bros.

Claimants' bid for the superstructure was $204,775.06 and the contract was awarded to it at that price. It was paid for the work, including some additions and extras, $205,935.36. The final estimate was approved on January 28, 1930, and a warrant for the balance then due claimant under the contract for the sum of $20,625.79 was delivered to and accepted by claimant on January 30, 1930.

On September 10, 1930, this suit was filed in which claimant is asking for additional compensation in the sum of $20,089.54. This sum is made up of various items which the declaration alleges "were lost to the claimant herein in and about the erection of the steel superstructure for said bridge under its contract aforesaid by reason of the failure of said Stresenreuter Bros. to erect and complete the substructure or piers for said bridge within the time limited by its contract and by reason of the failure of said State by and through said department to compel the same to be done."

In the view we take of the case it is not necessary to discuss the evidence relative to the various items constituting the claim. The plans and specifications for the work to be performed by claimant are a part of its contract and it is bound by their provisions. One of these provisions is as

follows: "The contractor shall assume all liability, financial or otherwise, and shall protect and save harmless the department from any and all damages or claims which may arise because of inconvenience, delay, or loss experienced by him because of the presence and operations of other contractors on the same project." This claim is based solely upon the delay of Stresenreuters Bros. in the construction of the piers. Their failure to have the piers in condition to receive the superstructure is the alleged cause of all the damages claimant charges is suffered. This clause of the contract specifically provides that the State shall not be liable for any damages so caused, and is a complete bar to the claimant's demand.

Another provision of the contract is: "The contractor shall receive and accept the compensation here provided in full payment for furnishing all materials, labor, tools, and equipment; for performing all work contemplated and embraced under the contract; for all loss or damage arising out of the nature of the work or from the action of the elements; for any unforseen difficulties or obstructions which may arise or be encountered during the prosecution of the work until its final acceptance by the Engineer; for all risks of every description connected with the prosecution of the work; also, for all expenses incurred by or in consequence of suspension or discontinuance of said prosecution of the work as herein specified, or for any infringement of patents, trademarks, or copyrights and for completing the work in an acceptable manner according to the plans and specifications." Then there is this further provision: "The acceptance by the contractor of the last payment as aforesaid shall operate as and shall be a release to the department from all claims or liability under this contract for anything done or furnished or relating to the work under this contract, or for any act or neglect of said department relating to or connected with this contract." These provisions of the contract are broad and comprehensive, and they effectually bar claimant from any demand for loss suffered on account of any negligence of agents of the State. If as claimant contends the employees of the Department of Public Works and Buildings negligently failed to require Stresenreuter Bros. to complete the substructure of the bridge within the time provided in

their contract and such failure caused the loss for which this suit is filed, these provisions specifically release the State from payment of such loss. It may be the provisions are harsh, but with that we are not concerned. Claimant knew these provisions would be in its contract when it submitted its proposal or bid. When the work was awarded to it claimant executed the contract containing these provisions.

The contract establishes the rights and the liabilities of the parties thereto, and this court has no power to change or modify its terms. "The law permits parties competent to contract and free to do so, in the exercise of their judgment, to make their own contracts, and the proper function of courts is to enforce such contracts as made, where they do not conflict with any rule of law or good morals or the declared public policy of the State. When the intention of the parties to a contract is ascertained it is the duty of the courts to carry it out, and they cannot properly assume a guardianship over those who have the requisite capacity and are free to make such contracts as they choose." (*Parker-Washington Co.* vs. *Chicago*, 267 Ill. 136.) It is clearly manifest that the purpose of these provisions of the contract was to limit the compensation which claimant should receive to the contract price and to bar it from any claim to extra compensation.

It is not contended that claimant has not been paid the full contract price for the work. But extra compensation is asked because of additional expense alleged to have been incurred on account of the delay in the construction of the piers. Section 9 of Article 4 of the Constitution provides that "the General Assembly shall never grant or authorize extra compensation, fee or allowance to any public officer, agent, servant or contract, after service has been rendered or a contract made" etc. "Extra compensation is a payment or allowance in excess of that which was fixed by law or contract when the services were rendered." (*Porter* vs. *Loehr*, 332 Ill. 353.) The language of this provision is clear and unambiguous and its purpose cannot be misunderstood. (*Fergus* vs. *Brady*, 277 Ill. 272.) We have held in a number of cases that it was adopted by the people to protect themselves from the evils likely to arise from claims such as this one, and that it is mandatory and binding upon the legislature and the courts. (*Conway* vs. *State*, 6 Ct. Cl. 363; *Hall Construction Co.* vs.

State, 6 Ct. Cl. 326; *Anderson, et al* vs. *State*, 6 Ct. Cl. 318; *Paschen* vs. *State*, 6 Ct. Cl. 23.)

It follows that the award asked cannot be allowed. The claim is therefore denied and the case dismissed.

(No. 1333—Claim dismissed.)

UNITED DRUG COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 14, 1932.

DISMISSAL—*when case will be dismissed for want of prosecution.* Where, upon motion of Attorney General to show cause why case should not be dismissed for want of prosecution, cause is not shown by claimant, case will be dismissed.

Per Curiam:

Now comes the respondent by Oscar E. Carlstrom, its Attorney General, and duly moves the court for dismissal, pursuant to an order to show cause entered by this court on the 12th day of January, 1932, wherein the claimant was ordered to show cause on or before September 13, 1932, why the above entitled cause should not be dismissed for want of prosecution. And it appearing to the court that sufficient cause has not been shown by claimant, in accordance with the requirements of said order;

It is therefore, hereby ordered, adjudged and decreed, that said claim be and is hereby dismissed without an award, for want of prosecution, and the case stricken from the docket.

Done in open court during the above regular session this 13th day of September, A. D. 1932.

(No. 1334—Claim dismissed.)

PALM OLIVE PEET COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 14, 1932.

DISMISSAL—*when case will be dismissed for want of prosecution.* Where, upon motion of Attorney General to show cause why case should not be dismissed for want of prosecution, cause is not shown by claimant, case will be dismissed.

Per Curiam:

Now comes the respondent by Oscar E. Carlstrom, its Attorney General, and duly moves the court for dismissal,

pursuant to an order to show cause entered by this court on the 12th day of January, 1932, wherein the claimant was ordered to show cause on or before September 13, 1932, why the above entitled cause should not be dismissed for want of prosecution. And it appearing to the court that sufficient cause has not been shown by claimant, in accordance with the requirements of said order;

It is therefore, hereby ordered, adjudged and decreed, that said claim be and is hereby dismissed without an award, for want of prosecution, and the case stricken from the docket.

Done in open court during the above regular session this 13th day of September, A. D. 1932.

(No. 1341—Claim dismissed.)

WARD BAKING COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 14, 1932.

DISMISSAL—*when case will be dismissed for want of prosecution.* **Where, upon motion of Attorney General to show cause why case should not be dismissed for want of prosecution, cause is not shown by claimant, case will be dismissed.**

Per Curiam:

Now comes the respondent by Oscar E. Carlstrom, its Attorney General, and duly moves the court for dismissal, pursuant to an order to show cause entered by this court on the 12th day of January, 1932, wherein the claimant was ordered to show cause on or before September 13, 1932, why the above entitled cause should not be dismissed for want of prosecution. And it appearing to the court that sufficient cause has not been shown by claimant, in accordance with the requirements of said order;

It is therefore, hereby ordered, adjudged and decreed, that said claim be and is hereby dismissed without an award, for want of prosecution, and the case stricken from the docket.

Done in open court during the above regular session this 13th day of September, A. D. 1932.

(No. 1747—Claimant awarded $3,800.00.)

JOHN L. LEACH, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 14, 1932.

WALTER E. LINDGREN, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*when award may be made for—equity and good conscience.* Although there is no legal liability on the part of the State, where the evidence shows that claimant, an employee of the St. Charles School for Boys, sustained exceedingly painful and serious injuries, while acting clearly in the course of his employment and within the scope of his duties as a State employee, an award may be made on the grounds of equity and good conscience.

Mr. JUSTICE ROE delivered the opinion of the court:

The claimant, John L. Leach, presents a claim for damages in the amount of Ten Thousand Dollars because of injuries received by him while employed as military training officer at the St. Charles School for Boys on March 9, 1929. It appears that in the evening of this day the daughter of the managing officer, Mr. Otto A. Elliott, was married. The claimant discovered before the departure of the wedding party that the automobile in which the newly married couple were to ride was chained to another car. The wedding event had occasioned the gathering of several cars. As these cars were lining up to leave, the claimant had gone out to call attention to the fact that two cars were chained together, and with this evident intention of unfastening the chain. As he approached the place of departure the wedding party started away. With a flashlight in his hand he attempted to hail the cars. They paused, and he went to the rear car. As he was doing so the chauffeur in the front car started on. The claimant then crossed the highway toward the place where his car was parked. Just after he had crossed he was struck by an automobile going in the opposite direction to the wedding cars. This car was running at a high rate of speed without lights and had swung off the highway to give the cars of the wedding party more room. The claimant was thrown about forty feet by the impact and most severely injured.

Because of the accident the claimant suffered a comminuted fracture of the left femur; fracture of the right radius

ulna; fracture of one of the bones of the right hand; lacerated wound over the nose and another one over the right temple, and a severe nervous shock. These injuries caused the claimant to be confined in various hospitals for a period of eleven months, the amputation of one leg and the stiffening of the other leg.

There is no doubt that the injuries received by the claimant were exceedingly painful. His resultant condition is deplorably serious.

The evidence established the fact that the injuries were received while he was an employee of the State of Illinois in the regular performance of his duties. In this regard the testimony of the managing officer was as follows: "I had given Mr. Leach and the other men instructions in the event of any disturbance or trouble in or about the institution, that they were to take care of the trouble or disturbance as soon as they learned of it. These were specific instructions given by me. This same rule had prevailed at the institution for many years prior to this time. If any of these special men did not take care of trouble or disturbance such as was caused on March 9th, they would have been subjected to being fired or suspended for neglect of duty. It would be impossible to conduct the affairs of the institution without such a condition prevailing."

Although it is conceded by the attorney for the claimant that there is no legal liability, the claim is urged upon the ground of social justice, and that under the doctrine of equity and good conscience an award should be made in this case. It is true that under certain circumstances this court has held that such an award might be made when the claimant was acting clearly in the course of his employment and within the scope of his duties as an employee of the State. In this case the court finds that the claimant was so acting.

Since the accident claimant has received a salary of Eighteen Hundred Dollars per year, making a total of Fifty-four Hundred Dollars ($5,400.00) for the past three years. Taking this fact into consideration and allowing hospital and doctor's bills, compensation for the loss of one leg and sixty per cent loss of the other leg and temporary disability, the claimant would be entitled to receive Thirty-eight Hundred Dollars ($3,800.00).

While we do not concede any legal liability on the part of the State of Illinois, we believe on the grounds of fairness, equity and good conscience, under all the circumstances, that the claimant should be reimbursed for the losses sustained and this court therefore recommends that payment be allowed in the sum of Thirty-eight Hundred Dollars ($3,800.00) in complete and final settlement of all claims and demands occasioned by said injuries.

(No. 1759—Claim dismissed.)

Opinion filed September 14, 1932.

LUNDEEN, HOOTON, ROOZEN & SCHAEFFER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

DISMISSAL—*when case will be dismissed upon stipulation of parties.* Upon stipulation of the parties, because of action satisfied, the case will be dismissed.

Per Curiam:

This cause coming on to be heard upon the stipulation and agreement by and between the claimant, Lundeen, Hooton, Roozen & Schaeffer, co-partnership by A. N. Schaeffer, a co-partner, and the respondent by Oscar E. Carlstrom, Attorney General, that the above entitled claim be dismissed for the reason that said cause of action has been satisfied and the court being fully advised in the premises and there being no reason why the case should not be dismissed, it is therefore considered by the court that the cause be and the same is hereby dismissed.

(No. 1467—Claim denied.)

WILLIAM HIRTMAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 14, 1932.
Rehearing denied January 10, 1933.

NOAH GULLETT AND HAROLD TRAPP, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*Workmen's Compensation Act—when applicable to the State.* The Workmen's Compensation Act applies to the State only when it is engaged in some of the enterprises declared by section 3 of that Act to be extra hazardous.

SAME—*when award will be denied.* One employed as a special policeman or watchman at Illinois State Fair Grounds is not engaged in extra hazardous occupation and if injured while so employed no award will be made under Workmen's Compensation Act.

Mr. JUSTICE ROE delivered the opinion of the court:

The claimant, William Hirtman, was employed as a special policeman or watchman at the Illinois State Fair Grounds in Springfield. He alleges that he was injured while in the performance of his duties on the night of July 20, 1927.

In making his rounds on what was called the West Beat about nine o'clock at night he noticed a fire near the grandstand and a large wooden toilet which was about three blocks away from where the claimant was at the time. He started to run toward the fire and as he did so he ran into a stay iron which was part of the equipment used by a wrecking company then employed in wrecking the old grandstand. His left leg struck the stay iron on the front or interior side of the leg between the knee and ankle. The wounded portion was cut about four inches in length and about a quarter of an inch wide and bled after the injury.

At the time of the accident the claimant was 63 years of age.

From the evidence submitted there is no doubt that the claimant was injured in the manner claimed. However, there is grave doubt as to the results of the injury. There does not seem to be any temporary total disability nor any permanent partial disability resulting from this injury.

It is clear that the accident does not come within the provisions of the Workmen's Compensation Act because the claimant was not engaged in one of the extra-hazardous occupations enumerated in Section 3 of this Act. As the injury does not come within the provisions of the Workmen's Compensation Act and there is no other statute making the State liable for injuries received by employees; there is not any legal liability on the part of the State to pay the claimant compensation for his injuries.

The claim is therefore denied and the cause dismissed.

(No. 1620—Claim denied.)

GRACE BARTLE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 14, 1932.

MAURICE B. JOHNSTON, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*State not liable for personal injuries sustained by person in a public school building under control and supervision of board of education.* Where the board of education of a school district has the management, control and supervision of the schools of the district the State is not liable for personal injuries sustained by a person while in a school of such district.

SCHOOL DISTRICT—*agency of State.* School district is an agency of the State created to perform such duties as the State deems necessary to maintain therein free schools and neither the district nor the State is liable for the negligence of the board of education.

MR. JUSTICE THOMAS delivered the opinion of the court:

This action is for $10,000.00 damages claimant alleges she sustained on account of injuries occasioned by a fall on the stairway of the school building in School District No. 32, of Clinton County. On May 25, 1930, the baccalaureate sermon for the graduating class of the school was delivered in the school building. Claimant attended those services and while leaving the building "tripped on a loose and defective matting on one of the steps of the main stairway leading toward the main exit of the building and fell headlong down a flight of seven steps into the exit doors." Her right arm was broken at the wrist and her arms and legs and other portions of her body were bruised and injured by the fall. The foregoing facts are set forth in the declaration. It also charges the board of education of the school district "knew or by the exercise of reasonable diligence should have known" the "step was in a dangerous and unsafe condition" and negligently failed to properly repair it and put it in a safe condition.

The State has questioned the sufficiency of the declaration and the jurisdiction of this court by its plea.

The school building was under the supervision and control of the board of education of the school district. But the district is the mere agency of the State created to perform

such duties as the State deems necessary to maintain therein a free school. It follows, therefore, that neither the district nor the State is liable for the negligence of the board of education unless such liability is expressly provided by some statute. (*Lindstrom* vs. *City of Chicago*, 331 Ill. 144; *Peretz* vs. *State*, 6 Ct. Cl. 356.) As there is no statute making the State liable for injuries caused by the negligent acts of school boards claimant is not entitled to an award. The claim is denied and the case dismissed.

(No. 1621—Claim denied.)

CECIL T. BARTLE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 14, 1932.

MAURICE B. JOHNSTON, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL. DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*when no award will be made for personal injuries sustained by a person in a public school building.* The facts upon which this claim are based are the same as in *Grace Bartle* vs. *State*, No. 1620, *ante*, and the opinion in that case governs herein.

Mr. JUSTICE THOMAS delivered the opinion of the court:

This is an action for $5,000.00 for damages claimant alleges he sustained on account of injuries to his wife caused by a fall on the stairway of the school building in School District No. 32 of Clinton County.

The facts upon which this claim is based are the same as that of *Grace Bartle* vs. *The State*, No. 1620, and the opinion in that case governs this. The claim is denied and the case dismissed.

(No. 1668—Claimant awarded $693.75.)

DELMAR C. BLAKE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 14, 1932.

ROBERT M. NIVEN, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL. DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made.* Where facts are undisputed that claimant sustained accidental injuries arising out of and in course of employment, while engaged in extra hazardous occupation award will be made, and amount determined under provisions of Workmen's Compensation Act.

Mr. JUSTICE ROE delivered the opinion of the court:

The claimant, Delmar C. Blake, was employed as a carpenter with the Congress Construction Company in the construction of the Deep Water Way of the State of Illinois between Morris and Joliet. On October 12th, 1929, while he was so employed the scaffolding on which he was working broke, and he fell or jumped about fourteen feet landing on concrete. The heel bones of both feet were crushed and he was taken to a hospital at Morris where he remained three weeks. Thereafter he was obliged to use a wheelchair until about January 1st, 1930. For this injury the claim for damages is made. It is a claim filed under the provisions of the Workmen's Compensation Act of 1911, for recovery of damages due to personal injuries sustained by claimant while an employee of the respondent.

Claimant was employed by the Congress Construction Company, with the consent and approval of the Division of Illinois Waterways, Department of Purchases and Construction and worked as a carpenter on the Dresden Island Project No. 3, Illinois Waterways. Claimant is considered an employee of the State because construction work on this project proceeded under the provisions of a contract of employment entered into December 4, 1928, between the Department of Purchases and Construction and the Congress Construction Company, known as Contract No. 3 or Dresden Island Lock and Dam contract.

This contract sets forth an agreement whereby the said company was to act as superintendent of labor and manager of construction in behalf of the respondent through its Department of Purchases and Construction in the completion of certain construction work on the Dresden Island Lock and Dam, near Morris, Illinois.

This contract was entered into under the statutory authority granted by virtue of Section 12 of "An Act in relation to the construction, operation and maintenance of deep waterway, etc.," approved June 17, 1919 and commonly called the

Waterway Act. (Par. 20, Chap. 19, Smith-Hurd's Illinois Revised Statutes, 1931.)

Claimant worked at his occupation as a carpenter for about twenty years and at the time of the accident was forty-five years of age. He was married and living with his family consisting of his wife, a daughter nineteen years old and a son seventeen years of age when the accident occurred. His wife has subsequently died.

There is no dispute as to the facts relating to the injury. Claimant suffered broken heel bones in both feet, and as a consequence of which he suffered a temporary total disability from October 12, 1929 to approximately April 1, 1930. This is a period of approximately twenty-six weeks or six and one-half months.

This claim is filed under the provisions of the Workmen's Compensation Act by virtue of Section 25 of the Waterway Act of 1919. (Par. 103, Chap. 19, Smith-Hurd's Revised Statutes, 1931.)

Claimant is entitled to the maximum of $15.00 per week by virtue of Section 8(e) of the Act. For a period of twenty-six weeks' disability this would total the sum of $390.00 as temporary total disability.

At the time of the accident claimant has no minor children under the age of sixteen years and is, therefore, not entitled to any additional compensation by virtue of minor children. As to permanent partial disability of fifteen per cent in the loss of the use of right foot, under Section 8(e)-14) claimant would be entitled to fifteen per cent of $15.00 per week for one hundred thirty-five weeks or a total of $303.75.

In view of all the evidence we award the claimant the sum of $693.75 and recommend that the same be paid.

(No. 1692—Claimant awarded $65.50.)

V. B. MARQUIS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 14, 1932.

V. B. MARQUIS, M. D., pro se.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

MEDICAL SERVICES—*when award may be made.* Where evidence is uncontroverted that claimant rendered medical services at the request of President of Illinois State Normal University, and amount claimed is reasonable and undisputed, an award therefore will be made on claim filed within statutory period on recommendation of proper authority.

Mr. JUSTICE ROE delivered the opinion of the court:

The claimant, V. B. Marquis, presents his claim in the amount of sixty-five dollars and fifty cents ($65.50) for medical services rendered to the Illinois Normal University of Normal, Illinois.

In the month of April, 1929, an epidemic of smallpox broke out in the communities of Bloomington and Normal, Illinois, and therefore it was deemed necessary by the President of the Illinois State Normal University at Normal to have all the students vaccinated. The University Physician was authorized by the said University President to do the work and to employ whatever help necessary. V. B. Marquis a practicing physician and surgeon was engaged to help in this work and on April 26, 1929, vaccinated 150 students and on May 6, 1929, he vaccinated 112 students. Due to the fact that claimant's bill for these services was not presented to or received by the proper State authorities prior to September 30, 1929, it was impossible to make the payment because of the lapse of the biennial appropriation.

There is no controversy as to the services rendered or value of the same. The President of the Illinois State Normal University says in his report: "It seems to me that the account should be approved."

Therefore, inasmuch as he has presented his claim to this court within the proper time fixed by the Statute of Limitations the court recommends that the claimant be allowed the sum of $65.50.

(No. 1714—Claim denied.)

FRED A. SAPP, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 14, 1932.

FOLLETT & FOLLETT, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*when no award will be made for.* Where property damage results from the negligence of a State employee, no award will be made for such damage.

NEGLIGENCE—*State not liable for negligence of its employees.* No government is liable for the negligence of its employees in the absence of a statute making it liable for such negligence.

Mr. JUSTICE ROE delivered the opinion of the court:

This is a claim for damages alleged to have been caused by the negligence of a driver of a truck owned and operated by the State Highway Department of the State of Illinois at Ottawa.

The material facts are that on March 26, 1930 at approximately 10:30 a. m. one Walter Phau, an employee of the Division of Highways, Department of Public Works and Buildings of the State of Illinois was backing a Reo truck A-14 equipped with a V-snow plow from a highway garage located in the City of Ottawa, Illinois. That the said State employee backed the truck from an entrance to the garage down an alley connecting with Clinton Street in said city. At the intersection of the alley with said street there was a building owned by claimant herein, Fred A. Sapp, in the front of which were large plate glass windows. That on this occasion there was a car parked in the alley near the intersection with Clinton Street and on the opposite side of the alley from the Sapp building. The width of the alley was eighteen feet measured from building to building near the point of its intersection with Clinton Street.

Further, that in backing said truck down the alley it became necessary for the employee, Walter Phau, to pass between the parked automobile and the Sapp building. The truck driver was closely watching the parked automobile so as not to strike it with his truck when the left corner of the V-snow plow came in contact with the plate glass window, near the front of the Sapp building, breaking it. That said plate glass window was five feet, one and one-half inches by seven feet, seven and one-half inches in size. That at the time of the accident the surface of the alley and street was slippery due to snow and ice. The cost of replacing said window was Forty-four and 50/100 Dollars, as shown by the itemized statement of such expenditure. Claimant, at the time, carried no plate-glass insurance to cover said loss.

It has been stated many times in the decisions handed down by this court that the maintenance of a State highway is a governmental function which the State exercises through its officers and employees. If in the discharge of his duties an employee of the State is negligent and such negligence causes damage to property, as in this case, the negligence is an act of the employee only and cannot be regarded as the act of the State.

Therefore, no award will be made for damages caused by the alleged negligence of an employee of the State, unless there is a statute expressly making the State so liable.

The claimant's right of action in this case is against the driver of the truck and not against the State.

The claim is, therefore, denied and the cause dismissed.

(No. 1779—Claimant awarded $798.93.)

W. D. PHIPPS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 14, 1932.

CHARLES C. LEE, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made.* **Where it is undisputed and clearly proven that State employee sustained accidental personal injuries, arising out of and in course of employment, while engaged in extra hazardous employment, award will be made under provisions of Workmen's Compensation Act.**

Mr. JUSTICE THOMAS delivered the opinion of the court:

Claimant was employed by the Department of Works and Buildings, Division of Highways, in the repair of State Route No. 16. On September 17, 1930, while engaged with other employees in carrying heavy pieces of concrete off the highway he became very ill and was taken to a hospital. There it was discovered that he was suffering from a traumatic abscess in the abdominal cavity. He was operated upon September 20th and remained in the hospital until the first of November following when he was taken to his home. After going home he was confined to his room for about thirty days, and says he was not able to work until about the first of July.

His average weekly earnings for the year previous to his injury was $19.23, and he contends that he was totally incapacitated for work for 38 weeks. His medical bill was $172.25 and his hospital bill $261.50. These charges it is admitted are reasonable and have not been paid by the State. It is also conceded that his injury arose out of and in the course of his employment.

Section 3 of the Workmen's Compensation Act provides that the provisions of the Act shall apply automatically to the State when the State is engaged in business declared by the Act to be extra hazardous; and Paragraph 1 of Section 3 declares that the erection, maintaining, removing, remodeling, altering or demolishing of any structure to be extra hazardous. We have held in a number of cases that the construction or repair of a State paved highway is a structure within the meaning of this Act. (*Van Hoorbeke* vs. *State*, 5 Ct. Cl. 337; *Connole* vs. *State*, 6 Ct. Cl. 477.)

Section 8(a) of the Act provides that the employer shall provide the necessary medical, hospital and surgical services reasonably required to cure or relieve the injury of the employee. Section 8(b) provides that the employee shall be paid one-half of his weekly earnings for the period he is totally incapacitated, which was 38 weeks. Upon that basis his compensation is the sum of $365.18. He is also entitled to be paid his medical and hospital bills which added to his compensation makes the sum of $798.93.

Claimant insists that he is also entitled to be paid $7.50 per week for six weeks on account of partial incapacity. There is no evidence in the record upon which that claim can be sustained.

It is therefore ordered that claimant be and he is hereby awarded the sum of $798.93.

(No. 1789—Claimant awarded $2,500.00.)

GOTTLIEB KAYHS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 15, 1932.

PERSONAL INJURY—*when award may be made although the State is not legally liable—respondeat superior—equity and good conscience.* Even though the State is not legally liable, where injuries sustained by claimant were directly attributable to the gross and wanton negligence of an agent of the State and are serious and distressing and not the result of contributory negli-

gence on part of claimant, the Court will recognize an exception to the general rule of the non-liability of the State and upon the theory of equity and good conscience recommend an award to claimant.

MR. JUSTICE ROE delivered the opinion of the court:

The claimant, Gottlieb Kayhs, was seriously injured by an employee of the State of Illinois on May 14, 1931, and damages in the amount of Twenty-five Thousand Dollars is claimed therefore.

On the above day at about five o'clock in the afternoon the claimant was walking south on a bridge across the Sangamon River and a portion of Lake Decatur. This bridge forms a part of State Bond Issue Route No. 2 with an eighteen foot roadway in the center, flanked on both sides by a raised sidewalk four feet in width and on the outside border of the bridge is an iron protection railing approximately four feet high.

While the claimant was thus crossing the bridge a State owned motor truck used by the Division of Highways and driven by Wallace Dudley, a State employee, crossed the bridge in the opposite direction. The said Wallace Dudley had been dragging the earth shoulders on the road south of the bridge. In order to accomplish this work it was necessary to fasten a wooden timber or pole crosswise of the truck to which was attached the drag. Mr. Dudley having stopped dragging had detached the drag from the pole but neglected to remove the pole which projected about four feet from the side of the truck. As he proceeded across the bridge the pole which evidently stuck out across the sidewalk hit the claimant and dragged him about twelve feet.

The claimant suffered great bodily injury, necessitating the amputation of his left leg and considerable medical attention and hospitalization. He is sixty years of age and the father of two minor children. There is no doubt that the claimant sustained such grave injuries that he will be unable to follow his occupation as a coal miner, being crippled for life by the loss of his left leg. In addition to the leg which was amputated, the right leg was severely injured. His nose which was fractured has not healed properly, as is disclosed by the medical testimony in the record.

The attorneys for the claimant have frankly said: "We concede that under the law, the State of Illinois is not liable

for the torts of its agents, employees or servants, under the rule of respondent superior. This is admitted to be one of the attributes of the Sovereignty of the State of Illinois, but this court has been created as a tribunal to pass upon claims *ex contractu* or *ex delicto*, which the State as a Sovereign Commonwealth, in equity and good conscience should pay and discharge. It it under this statutory provision that this claim is presented." It is the well settled rule of law that the State is not liable for damages or injuries caused by the carelessness or negligence of its servants, employees, agents or officers. This rule has been so frequently set forth by this court that it is not necessary to again recite the many cases so holding.

However, it is also the duty of this court to consider the principle of equity as well as the rule of law. There have been some exceptional and isolated cases where the injuries have been so grave and the conditions surrounding the claimant so deplorable that under the principle of equity exceptions have been made very infrequently and only upon the broad theory that when all the facts in the case are considered together, there is sufficient justification for the court to conclude that the claim should be classified as an exception to the general rule above stated. In this case the counsel for respondent have not filed a demurrer but have on the other hand suggested that this case may be an exception to the general rule. Counsel says:

"In order to bring a claimant within this exception, the personal injuries suffered must be grave and permanent in nature with serious and grievous consequences resulting; the injuries must be directly attributable to the gross and wanton negligence of an agent of the respondent, and the claimant must be free from all contributory negligence in reference to the injury. (*Hansen* vs. *State*, 6 C. C. R. 548; *Rickenberg* vs. *State*, 6 C. C. R. 286; *Parker* vs. *State*, 6 C. C. R. 71 (75). The Court has frequently seen fit to apply this exception to the general rule, paraphrasing by granting an award in the interest of social justice and equity, or, as sometimes stated, applying the doctrine of equity and good conscience. Regardless of the terms used to designate this equitable and humanitarian doctrine when applied, the general application of this principle amounts to a well recognized exception to the general rule, although its application is dependent entirely upon the individual facts presented by each case. In addition to the *Hansen*, *Rickenberg* and *Parker cases*, *supra*, the exception has been applied by the Court in the following cases: (*McGhee* vs. *State*, 4 C. C. R. 144; *Engelman* vs. *State*, 5 C. C. R. 242; *Stachowiak* vs. *State*, 5 C. C. R. 275; *Williams* vs. *State*, 5 C. C. R. 368."

In the report of the Division of Highways, Department of Public Works and Buildings submitted September 11, 1931, the Engineer of Maintenance says: "I am convinced that there was more or less carelessness on the part of the driver of the State truck and I believe that Mr. Kayhs is entitled to a reasonable reimbursement for damages sustained on account of the accident."

While there is no legal liability on the part of the State to pay claimant compensation for his injuries the injuries in this case are "directly attributable to the gross and wanton negligence of an agent of the respondent" and are serious and distressing and are not the result of contributory negligence. We believe that upon the theory of equity and good conscience an exception should be made in this case. However, we also believe that when an exception is so made that the compensation should be adequate only to and commensurate with humanitarian needs to recompense the claimant for medical attention, hospitalization and other necessary expense caused by the accident. This court wishes to be fair to the claimant and consider his case from a reasonable and equitable viewpoint, yet it must also be mindful that the funds of the State must be safeguarded and the interests and rights of all the People of the State preserved.

The Court of Claims has jurisdiction to determine whether the claimant shall have such compensation and it also has the right to determine the amount of compensation which should be allowed.

In view of all the circumstances under which the injuries were received and also because of the recommendations made by the Division of Highways we allow the claimant, in full settlement of all claims arising from this accident, the sum of Twenty-five Hundred Dollars and recommend that the same be paid.

(No. 1870—Claim denied.)

WINNEBAGO COUNTY FOREST PRESERVE DISTRICT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 14, 1932.

T. G. LINDQUIST, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

ILLINOIS NATIONAL GUARD—*property damage by—when award will be denied.* Where claimant, a Forest Preserve District, permitted Illinois National Guard to use its property for an over night camp and trees therein were destroyed by the members thereof, the State is not liable therefor as it is not responsible for wrongful destruction of property by members of the Illinois National Guard and an award will be denied.

SAME—*negligence of officers—right of action for.* It is the duty of officers of the Illinois National Guard to so supervise and direct the members thereof, under their command, so that the property of others will not be injured, and if they fail to do so, and damage is suffered as a result thereof by others, it is actionable negligence for which they are answerable to the injured party in courts of general jurisdiction.

Mr. JUSTICE THOMAS delivered the opinion of the court:

This claim is for $244.92 for damages caused by destruction of trees of claimant by members of the Illinois National Guard. T. J. Lindquist is County Forester of Winnebago County and has the control and supervision of the Winnebago County Forest Preserve District. In August, 1930, Mr. Lindquist granted the National Guard permission to use a portion of the Forest Preserve District for an overnight camp, by the 122nd Field Artillery, and it was while they were camped there that the trees were destroyed.

The National Guard is a part of the State government, its officers and members being agents of the State when in the lawful discharge of their duties. It does not follow, however, that the State is liable for all damages caused by them. The State is never liable for the torts of its agents unless there is a statute making it so liable. This rule is so universal and has been so often announced by this and other courts that a citation of authorities is deemed unnecessary. There is no statute in this State making the State responsible for the wrongful destruction of property by members of the National Guard. Claimant, however, is not without remedy for any loss it may have sustained by the destruction of the trees. It was the duty of the officers in charge of the Field Artillery to see that the horses and tents of the men under their command were so placed and supervised that claimant's trees would not be injured, and if they failed to do so such failure was actionable negligence. When officers of the National Guard by wrongful and negligent acts cause injury to the person or property of others they are answerable to the injured party in the courts for the loss sustained by such acts.

Such acts are the acts of the officers and not the State. (*Joos* vs. *Ill. National Guard*, 257 Ill. 138; *Haye* vs. *State*, 5 Ct. Cl. 358; *Kershaw* vs. *State*, 6 Ct. Cl. 387.) There being no statute making the State liable for claims of the character of this one, and the State never being liable for the wrongful conduct of its officers and agents this court is powerless to make an award for the damages claimant alleges it suffered. The claim is therefore denied and the case disallowed.

(No. 1969—Claimant awarded $20.16.)

H. CHANNON COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 14, 1932.

H. CHANNON COMPANY, by its Secretary, E. C. NELSON.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

SUPPLIES—*when award will be made for supplies furnished the State.* When claimant's bill for supplies furnished the State is not presented for payment before the appropriation out of which it could be paid has lapsed, an award will be made for the amount due upon the recommendation of the department receiving such supplies.

Mr. JUSTICE ROE delivered the opinion of the court:

This claim is filed by the claimant company, pro se, for the sale price of a thirty-inch saw blade in the sum of $20.16. This saw blade was part of a shipment of goods ordered by the Department of Purchases and Construction on June 16, 1929, order number C-52457, to be used in State construction work on the Dresden Island Lock and Dam Project, Illinois Waterway at Devine, Illinois. The shipment was delivered but through inadvertent error the cost of the saw blade was billed to the respondent at $30.16. Recognizing this error the respondent paid for the goods so ordered, less the cost of the saw blade, the order being billed at $595.22 and the respondent paying thereon the sum of $565.06 on August 30, 1929. A separate billing was then requested from claimant, covering the disputed item of cost of saw blade and this corrected statement, in the amount of $20.16, was received by the respondent on to-wit: September 17, 1929. However, the Department of Purchases and Construction failed to approve and place this corrected statement in line for payment until after the biennial appropriation from which the claim could

have been paid had lapsed into the general fund on to-wit: September 30, 1929.

There can, therefore, be no question but what the authority of the Department of Purchases and Construction was properly exercised in making this purchase and that the bill could have been properly paid by such department had it not been for the lapsing of the appropriation as aforesaid.

For the reasons above set forth, the court recommends that the claimant be allowed the sum of $20.16.

(No. 1987—Claim denied.)

RAYMOND DESUTTER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 14, 1932.

F. W. RENNICK, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

TUBERCULAR CATTLE—*power of State to order destruction—statute allowing compensation for—necessity for compliance with.* The questions involved herein have been decided by this Court in *Price* vs. *State*, No. 1724, *ante*, and *Paddock* vs. *State*, 6 Court of Claims Reports 496, and the opinions therein are controlling in this case.

Mr. JUSTICE THOMAS delivered the opinion of the court:

On March 21, 1930, claimant's herd of cattle was tested for tuberculosis by one of the veterinarians of the Department of Agriculture. Four of his milk cows were found to be infected with that disease, and he was ordered to have them destroyed within 30 days as the law provides. The cows were appraised, 3 of them at $110.00 each and one at $115.00, the total appraisement being $445.00. On April 22nd claimant shipped the cattle to Chicago for sale and slaughter and they were sold for the total sum of $274.82, being $170.18 less than their appraised value, and were slaughtered on April 24th. Claimant asks for an award against the State for two-thirds of the difference between the appraisement of the cattle and what they sold for.

Section 8 of the Bovine Tuberculosis Eradication Act provides: "No compensation shall be paid to any person for an animal condemned for tuberculosis if the owner retains the

animal for more than thirty days after it has been adjudged infected with tuberculosis."

This statute is mandatory and its meaning is so plain it cannot be misunderstood. Claimant was ordered to have the infected cows destroyed within 30 days and neglected to do so. He cannot, therefore, be granted an award as the court has no power to allow claims in disregard of the plain provisions of the law. (*Paddock* vs. *State*, 6 Ct. Cl. 496; *Ritz* vs. *State*, 6 Ct. Cl. 526.) The claim is denied and the case dismissed.

(No. 1869—Claimant awarded $7,789.33.)

E. B. KAISER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 25, 1932.

C. W. MIDDLEKAUF, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*when award may be made for losses sustained, caused by delay of others.* Where the evidence shows that claimant, an original contractor for installation of plumbing was prevented from making such installation by reason of delay of general contractor in progressing with erection of structure, resulting in loss to claimant, wholly without his fault, an award will be made upon recommendation of Attorney General where it is shown that claimant was at all times ready, able and willing to perform his contract and that same failed to provide that the State should not be liable for delay.

Mr. JUSTICE ROE delivered the opinion of the court:

The claimant, E. B. Kaiser, presents a claim for $12,062.85. E. B. Kaiser is a trade name, the business being owned by Albert C. Kaiser and Edward W. Kaiser, co-partners doing business under the firm name of E. B. Kaiser. On November 7th, 1929, the complainants, who are plumbing contractors entered into a contract with the State of Illinois, through the Department of Purchases and Construction of which Mr. Henry H. Kohn is Director, to furnish material, labor and supervision in installing the plumbing in ten new buildings at the Lincoln State School and Colony, Lincoln, Illinois. When the contract was entered into, co-partnership included Edmund B. Kaiser who has since died.

The contract provides that the claimants, E. B. Kaiser, were to install the various items of plumbing in the ten build-

ings as the work of the general contractor, the J. B. French Company, should progress, Article 2 of the contract specifies that E. B. Kaiser shall substantially complete their contract by April 22, 1930.

It appears from the evidence submitted that it is the established custom of the building business that the plumbing contractors install the plumbing work at such times as the general contractor makes it possible, by his work, to have the plumbing installed, and that this plumbing cannot be installed until the general contractor's work has progressed to the point where such installation is possible.

The general contractor, the testimony shows, did not proceed with its work according to the contract and progress schedule, and therefore the claimants were delayed in completing their contract at the time specified. It seems clear from the evidence in the case that the claimants were constantly on the ground ready and willing to complete their contract but were delayed and hindered from so doing by the delays in the construction of the said ten buildings caused by the J. B. French Company. Inasmuch as the claimants had no contract, agreement or understanding of any kind with the J. B. French Company, and were not subcontractors under the direction of the general contractor, but that a separate contract directly with the State of Illinois, and the contract does not recite that the State shall not be holden for damages for delay, the State is liable to the Claimants for the damage actually sustained by them, and they should be reimbursed for added expenditures caused by the delay.

The claimants on July 23, 1930, advised the Department of Purchases and Construction that the delays of the general contractor had already cost the claimants $8,278.90. After some correspondence, the Division of Architecture and Engineering advised that the claim would have to be referred to this court. Thereafter, claimants aver on account of delays caused by the J. B. French Company, the claimants could not complete their contract until November 19, 1930, which was six months and twenty-seven days later than the time schedule agreed upon by the claimants and respondent. Upon the completion of their work, the claimants' total damage for extra expense caused by the delays was fixed at $12,062.85. This amount the Division of Architecture and Engineering says is exaggerated and should be reduced.

Therefore, although the respondent concedes that a legal liability does exist, by stating that the amount should be reduced yet it contends that the claim of $12,062.85 is excessive and not fully proven by the evidence. To support this contention reports from the Division of Architecture and Engineering set forth the negotiations for settlement and its recommendations in regard thereto. In these reports it appears that as to most of the items of damage there is no dispute.

There is no doubt that the claimant, E. B. Kaiser did submit its claim as set forth in the above reports. Furthermore, it is clear that E. B. Kaiser is the only one of the various contractors who filed a claim and therefore is the only contractor entitled to any consideration for damage due to the delays of the General Contractor.

No objection is made to an extra six month's salary paid to the field superintendent amounting to $2,210.00 and no objection is made to his expense of room and board and railroad fare expended during that time amounting to $447.36. However, respondent contends that the item of overhead during the period figured at $7,031.00 is unreasonable and excessive. The original report of the Division of Architecture and Engineering says that the sum of $3,131.97, which is set up therein is a reasonable allowance for overhead based upon the contract work to be done after June 4, 1930, amounting to $36,725.15, balance of the work on contract. This amount is undisputed as balance of work to be done. The Attorney General recommends that an award be made in the sum of $7,789.33. The court has carefully considered the evidence and has given cognizance to the cases and arguments submitted.

The Court of Claims is given jurisdiction in Paragraph 4 of Section 6 of the statute "to hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, *ex contractu* and *ex delicto*, which the State, as a sovereign commonwealth, should in equity and good conscience discharge and pay." It is manifest from this provision of the statute that the legislature intended to give this court jurisdiction in such claims as herein presented and not only jurisdiction to determine whether the claimants are entitled to compensation, but also the amount they should be allowed.

Taking all the facts and circumstances into consideration with the reports from the Division of Architecture and Engineering and the recommendation of the Attorney General, we are of the opinion that the claimant is entitled to an award in the total sum of Seven Thousand Seven Hundred Eighty-nine and Thirty-three One Hundredths ($7,789.33) Dollars, and this court recommends that payment in that sum be allowed and made.

(Nos. 540-552-560-566-567-901—Claims dismissed.)

THE NEW YORK CENTRAL RAILROAD COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 5, 1932.

DISMISSAL—*when case will be dismissed upon motion of claimant.* **Where it appears that there is no reason why the cause should not be dismissed, same will be dismissed upon motion of claimant.**

Per Curiam:

This cause coming on to be heard upon motion of claimant filed on November 23, 1932, to dismiss the above entitled claims, and the court being fully advised in the premises and it appearing there is no reason why said case should not be dismissed, it is, therefore, considered by the court that said cases be and the same is hereby dismissed upon motion of claimants.

(No. 553—Claim dismissed.)

LAKE ERIE & WESTERN RAILROAD COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 5, 1932.

DISMISSAL—*when case will be dismissed upon motion of claimant.* **Where it appears that there is no reason why the cause should not be dismissed, the case will be dismissed upon the motion of claimant.**

Per Curiam:

The cause coming on to be heard upon motion of claimant filed on June 12, 1932, to dismiss the above entitled claim, and the court being fully advised in the premises, and it appearing there is no reason why said case should not be dismissed, it is, therefore, considered by the court that said case be and the same is hereby dismissed upon motion of claimant.

(No. 1132—Claim denied.)

GEORGE KATANICH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 5, 1932.

RES ADJUDICATA—*when case will not be considered.* Where it appears case has been considered and an award made, being in full of demand made, case will not again be heard.

MOTION TO RE-OPEN—*when denied.* Where it appears that motion to re-open cause and for leave to amend declaration and increase *ad damnum* is not filed for more than two years after filing of opinion making award in cause, motion will be denied.

Per Curiam:

This cause coming on to be heard upon motion of claimant to reopen said cause, and for leave to amend his declaration and increase the *ad damnum,* which motion was filed on May 12, 1931, and it appearing to the court that at an adjourned session of the January term held on May 12, 1927, an award of $2,500.00 was made, the said amount being in full of demand in the claim filed by claimant, and it further appearing that said motion was not filed for more than two years after the filing of the opinion making said award, it is, therefore, considered by the court that said motion be and the same is hereby denied.

(No. 1528—Claim denied.)

WILLIAM L. LINDSAY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 5, 1932.

WALTER W. WILLIAMS AND CARTER HARRISON, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*equity and good conscience—when award on grounds of will be denied.* Where claimant, a student at the University of Illinois, sustained injuries, while observing an experiment being conducted by an instructor of said University, which was being made with reasonable care and in accordance with the usual custom of making particular experiment, an award on the grounds of equity and good conscience will be denied, there being no gross carelessness or wanton negligence on the part of said instructor shown.

Mr. JUSTICE ROE delivered the opinion of the court:

On October 13, 1927, William L. Lindsay, the claimant, received a personal injury while a student of Mining Engineering at the University of Illinois, for which he seeks damages.

The University of Illinois is a State institution, organized under the laws of Illinois in 1887, and is situated in the cities of Urbana and Champaign.

It is claimed that on the day of the injury, David Mitchell an instructor and agent of the State, was conducting a laboratory class in Mining Engineering in Room 101 of the Mining Engineering Laboratory at the said University. William L. Lindsay, who was a student in the above laboratory class, known as Mining 20, was observing an experiment in the detection and ventilation of mine gases, which was being made by his instructor, David Mitchell. This experiment was performed by introducing gas into a small wooden box or container, with a glass observation window in the front. A safety lamp surrounded by a wire gauge specially prepared, was placed in the wooden box which was about two feet high and one foot in length and width. The principle of the experiment was to detect the presence of gas in the above wooden box or chamber, by the use of this safety lamp. The lamp was lighted and protected by the wire gauge, the presence of gas was denoted by a change of color in the flame as the gas was let into the box through holes or nipples. The change of color was indicated by the gas cap that formed on the top of the flame. To observe this gas cap rise on the flame, it was necessary to stand very close to the box and look through the glass front. The object of this particular experiment was to determine the presence of methane gas, known as chemical formula C H 4.

On this occasion acetylene gas and a Koehler lamp were used for the experiment. A fellow student, George Young, put the lamp into the box which was filled with acetylene gas of an unknown quantity, while the claimant, with his instructor, was standing in front of the box, peering through the glass to observe the cap on the flame. As they were observing this experiment, suddenly an explosion occurred which shattered the glass observation window and pieces of flying glass cut both the instructor and the claimant about

the face, and a piece of the glass was hurled into the left eye of claimant.

Because of this accident medical and surgical treatments were necessary and the claimant expended therefore the sum of $269.25.

As the result of the injury and subsequent operation the iris of the claimant's left eye has lost much of its contractile strength with a permanent loss of about fifty per cent of the eye sight, and a permanent disfigurement of the eye.

For this injury the claimant asks One Thousand Dollars in damages, upon the grounds that the State is liable because experiment box was not properly constructed; also because acetylene instead of methane gas was used, and further because the instructor was grossly and wantonly negligent for conducting his classes with appliances which should have been free from defects and safe for experimentations.

Counsel for the respondent contend, and counsel for the claimant admit that the doctrine of respondent superior does not apply to the State and the State is not liable for the misfeasance, wrongs, and negligence of its employees, agents or servants. It follows, therefore, that in this case there is not any legal liability on the part of the State of Illinois.

It is contended, however, by the claimant that even if there is no legal liability on the part of the State, it should be required to pay as an act of equity and social justice. We agree with claimant's counsel that "any claimant or individual who considered himself aggrieved might bring a suit in law or in equity, as the case might necessitate."

Paragraph 4 of Section 6 of the Act creating the Court of Claims supports this contention. The language of paragraph 4 is as follows:

> "To hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, *ex contractu* and *ex delicto*, which the State, as a sovereign commonwealth should in equity and good conscience discharge and pay."

The question, therefore, for this court to consider in the present claim is one of equity and good conscience. In this regard the rule has been repeatedly announced and followed by this court that the State should pay claims for damages in which negligence of a State, agent or employee is alleged, only when such agent or employee has been grossly careless and wantonly negligent. Consequently the main matter for

discussion and decision is one of gross and wanton negligence. Was the instructor in this case grossly careless and wantonly negligent for making an experiment with a box or container which did not have a "false or safety back," and in using for this experiment acetylene instead of methane gas?

The record shows that the acetylene gas was much easier to make, but its use was much more dangerous than methane gas.

Furthermore, if a card-board back such as is used by the Bureau of Mines, had been on the back of the box or container, the resistance to the gas would have been less than the glass front when the explosion took place, and the glass would not have broken because the gas would have burst out through the false back.

It is often difficult to draw the line of distinction between ordinary negligence and gross or wanton negligence. To determine the negligence in most instances, it is necessary to study carefully all the facts presented by the evidence. An investigation of the record herein would indicate that the instructor, David Mitchell, was not wantonly nor grossly negligent. The evidence shown that he also was hit in the face by the shattered glass. It is reasonable to conclude that he would not have subjected himself as well as his students, to possible injury by using either a box or a gas that he knew was extremely dangerous. It is always easy to say after an accident occurs that if something else had been done the accident could have been avoided. In this matter, it would seem that the instructor conducted the experiment with reasonable care and in accordance with usual custom of making this particular experiment at the University of Illinois.

The case of *Archie L. Johnson* vs. *State of Illinois,* Court of Claims Report, Vol. 5, page 178, is cited by counsel for claimant to sustain their contention that this court therein made a decision and thereby set a precedent in a very similar case.

In the above case set forth an act of an agent or employee of the State was not involved in the decision and the question of gross or wanton negligence was not raised. The student himself was operating a saw and not an agent or employee of the State. That is the distinction between this case and the one cited above.

From all the facts and circumstances we have concluded that the claimant's case cannot be considered to come under the rule of equity and good conscience. It is, therefore, recommended that the claim be disallowed and it is herewith denied and dismissed by this court.

(No. 1647—Claim denied.)

K. & S. MANUFACTURING COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 5, 1932.

WATKINS, TEN HOOR & GILBERT, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for the State.

CONTRACTS—*letting labor of prisoners void.* The Fourth Amendment to the Constitution of this State plainly prohibits the letting by contract of the labor of any convict confined within the penitentiary or other reformatory institution and a contract entered into for such labor is absolutely void and no cause of action can be based upon it.

CONSTITUTION—*4th amendment self executing—purpose.* The 4th amendment to the Constitution of this State is self executing and requires no legislative enactment for its operation and its purpose is to prevent prison labor from entering into competition with free labor.

SAME—*statute regulating employment of convicts.* The statute of this State regulating employment of prisoners is in harmony with the letter and spirit of the 4th amendment to the Constitution.

EQUITABLE RIGHT—*usage of assumed right.* Long usage of assumed right to do an act does not make it valid where the act done is clearly prohibited by law. No right, either legal or equitable can be founded on a contract prohibited by law.

Mr. JUSTICE THOMAS delivered the opinion of the court:

Claimant's demand is for $36,985.78 damages it alleges it suffered because the Department of Public Welfare failed to comply with the provisions of a contract made with claimant on June 5, 1929. On August 19, 1929, the Attorney General advised the Director of the Department of Public Welfare that the contract was void and the department thereupon refused to proceed further with the matter. The contract is in evidence. The first party is the Department of Public Welfare and the second party is claimant. The contract contains the following provisions:

"It is hereby agreed and understood the party of the second part contracts with the party of the first part for the output of the furniture plant located at Stateville, Illinois, and the product to be manufactured in a line of cribs, bassinets and novelty furniture, the same as is now being manufactured by the party of the second part in their own plant. The party of the second party hereby agreed to pay the party of the first part cost of material and labor used in the manufacture of the above mentioned furniture, the labor to figure on a basis of fifteen cents per hour per man, employed six hours or more per day, and in addition to the above are to pay 10 per cent on the items of labor and material, the intent being the State to make a 10 per cent profit, plus cost of labor and material on prices agreed upon, provided, that in the event the party of the second part should furnish the materials used in any particular production, no charge shall be made by the State for materials in such production." The contract further provides that claimant will accept and pay for at least $760,000.00 worth of merchandise manufactured under its terms, and as much more as the State can furnish up to $1,000,000.00, for each twelve months of the life of the contract, and recites: "Party of the second part will furnish and be responsible for a general superintendent of the plant, who is to have full supervision and his salary is to be paid by the party of the second part. If it should be found necessary, for legal reasons, to have him appear as a State employee the State's payment will be purely nominal." There are other provisions in the contract but in our view these are the most important and the ones necessary to be considered in arriving at a proper decision of the questions involved in the case.

The State contends the contract is void because it contravenes the provisions of the Constitution and the statute regulating the employment of prisoners. Claimant insists that it is not contrary to any constitutional or statutory provision and that the State is liable to pay it all damages it suffered on account of the failure of the Department of Public Welfare to comply with its provisions.

The fourth amendment to the Constitution became effective November 22, 1886, and is as follows: "Hereafter it shall be unlawful for the commissioners of any penitentiary, or other reformatory institution in the State of Illinois, to

let by contract to any person, or persons, or corporations, the labor of any convict confined within said institution." The language of this provision is plain, and its purpose can not be misunderstood. It was intended to prevent prison labor from entering into competition with free labor. No legislative enactment was necessary to its operation. Any contract the effect of which is to let the labor of the prisoners is in violation of this clause of the Constitution and wholly void, and no cause of action can be based upon it. No court will lend its aid to enforce a contract entered into with a view of carrying into effect anything that is prohibited by law. (*Ambrose* vs. *Root*, 11 Ill. 497; *Paige* vs. *Hieronymus*, 192 Ill. 546.) "The rule established in this State undoubtedly is that a contract made in violation of a statute of Illinois is void and unenforceable, regardless of whether the statute so declares or merely prohibits the thing contracted to be done." (*The People* vs. *Board of Supervisors*, 122 Ill. App. 40 and cases where cited.) The contract in question is for the "output"—the entire production—of the furniture plant of the State at the Stateville prison, and all claimant is bound to pay for the output is the cost of the labor at 15 cents per hour, plus 10 per cent thereof which is in effect 16½ cents per hour. While the contract recites claimant is to also pay the actual cost of the material used, plus 10 per cent of such cost, it also provides "that in the event the second party should furnish the materials used in any particular production, no charge shall be made for the State for materials in such production." Under this clause of the contract claimant had the right to furnish the material, and if it exercised that right all it would pay the State would be for the labor entering into the products. The contract is clearly one for the labor of the prisoners, and the fact it is called a contract for the production or "output" of the prison factory does not change its legal effect. The goods were to be manufactured in the prison by prison labor for claimant and under claimant's supervision. It is obvious from the language of the contract that the purpose of claimant was to secure cheap prison labor in the manufacture of goods of the same kind then being manufactured in its own plant. These goods were cribs, bassinets, and novelty furniture. The contract is clearly prohibited by the fourth amendment to the Constitution and is void.

It is urged by claimant that under Section 11 of the Act to regulate the employment of convicts and prisoners the Department of Public Welfare had the right to enter into the contract. That Act was passed in 1903 and later was amended. At the time this contract was executed Section 3 of the Act contained the following provisions: The Board of Prison Industries shall see "that under no circumstances, shall any of the products of the labor of said convicts or prisoners mentioned in this Act, be sold upon the open market, except as hereinafter provided. They shall see that the said products do not enter into conflict with any of the established industries of the State except as hereinafter provided. It shall be their duty at all times, to inform themselves, so far as possible, of the industrial conditions of the State of Illinois, and to see that the labor of said convicts and prisoners does not enter into competition with the products of free labor, except as herein provided." Section 5 provided the Board of Prison Industries "shall not, nor shall any other authority whatsoever, make any contract by which the labor or time of any prisoner or convict in any penitentiary or reformatory of this State or the product or profit of his work shall be contracted, let, farmed out, given or sold to any person, firm, association or corporation; except that said prisoners or convicts in said penal or reformatory institutions may work for, and the products of their labor may be disposed of to the State, or for or to any public institution owned or managed and controlled by the State." Section 6 declared "that it shall be the policy of the State to use in such industries no more machinery or motive power, other than hand or foot power, than may be required to carry this Act into effect." Section 10 of the Act required the prisoners to be employed for the State, or in productive industries for the benefit of the State, or for the use of public institutions owned or managed and controlled by the State." Section 11 provides that the labor of prisoners "after the necessary labor for the manufacture of all needed supplies for said institutions shall be primarily devoted to the State and the public institutions and buildings thereof, and the manufacture of supplies for the State and public institutions and buildings thereof, and secondly to the school and road districts of the State and the public institutions thereof: But, provided, that if the demands of the State, the State institu-

tions and the school and road districts thereof, as herein provided, shall not be sufficient to furnish employment to all the prisoners of the penal and reformatory institutions of the State, then the Board of Prison Industries may and are hereby authorized to dispose of the surplus products of such labor to the best advantage of the State." It is clear from the language of these various provisions of the law that the intention of the legislature was to prevent the competition of prison labor with free labor; that it intended the prisoners should be employed in such work and in the manufacture of such articles as could be used by the State, the institutions of the State and the school and road districts of the State so that the products of their labor would not enter into goods sold on the open market to the general public. The law is in harmony with the letter and spirit of the fourth amendment to the Constitution. The contract in question violates the letter and spirit of both that amendment and this Act. It is an apparent attempt to evade their provisions. It is axiomatic that one cannot do indirectly what he cannot do directly.

It is urged that the contract was made in good faith, and that if it violates the law claimant and the officials of the Department of Public Welfare did not know it. They will not be heard to say they were ignorant of the Constitution and laws of their State. (*Lewis* vs. *Headley*, 36 Ill. 433.) It would seem, however, they must have had some doubts as to the validity of the contract for it recites that if it should be found necessary, *for legal reasons*, to have the superintendent of the plant appear as a State employee the State's payment will be purely nominal.

It is urged that Section 11 gives the prison officials the right to dispose of the surplus products of the prison industries. It will not be assumed that the legislature intended to give the prison officials authority to do what the Constitution prohibits. It is manifest from a reading of all the sections of the Act that the intent of the legislature was to have the labor of the prisoners confined to the production of supplies that were needed by the State, State institutions and school and road districts. The legislature could not authorize, and it will not be assumed that it intended to authorize, the prison officials to deliberately create a vast surplus for the purpose of disposing of it on the open market in competition with free

labor. It was their duty to inform themselves as to the needs of the State and State institutions and to produce only such articles as the State and State institutions, school and road districts used, and to confine such production to their estimated needs. It is only such surplus that may remain after having done this that they are permitted to sell.

It is urged that similar contracts to this had been entered into by the prison officials before and for that reason this one should be held valid and enforceable. This contention cannot be sustained. Even if the Department of Public Welfare had been executing similar contracts for a period of years such fact would not render them valid. Long usage of an assumed right to do an Act does not make it valid where the Act done is clearly prohibited by law. These provisions of the Constitution and statute were enacted by the people for the purpose of declaring the public policy of the State relative to prison labor, and they cannot be ignored or set aside by public officials because the officials may think them unwise.

It is suggested that claimant has an equitable right to an award because it relied upon the State furnishing the goods and suffered loss because of its failure to do so. No right, either legal or equitable, can be founded on a contract prohibited by law. The contract being in violation of the Constitution and statute is void. There is no exception to this rule. Claimant is not entitled to an award, and the cause is dismissed.

Claimant has filed a petition for a rehearing. The petition is merely a reargument of the reasons urged by claimant in its original brief for the allowance of its claim. Every question raised in the original brief and petition for rehearing was carefully considered by the court, and decided in the opinion filed.

On August 19, 1929, the Attorney General gave Honorable Rodney H. Brandon, the Director of Public Welfare, an opinion in which he held the contract relied on by claimant to be illegal and void. He has filed an answer to the petition for rehearing recommending an allowance of $30,625.90 to claimant, although he states in his answer that he still adheres to that opinion. As this court also holds the contract to be in violation of the Constitution and statute of the State it follows no award can be made. The petition for a rehearing is therefore denied.

(No. 1680—Claim denied.)

SANDY CRAWFORD, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 5, 1932.

SANDY CRAWFORD, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

LIMITATIONS—*when plea of Statute of Limitations will be sustained.* Where it appears that claim has not been filed within five years after it first accrued, plea of Statute of Limitations will be sustained and case dismissed.

Mr. JUSTICE THOMAS delivered the opinion of the court:

Sandy Crawford, late of Co. L, 8th Ill. Inf., claimant, has filed his claim for two months services between enrollment and date rejected. In his declaration he states that he was enrolled on the 28th day of June, 1898 and was rejected at Springfield, Illinois, the latter part of August, 1898, and filed his declaration in this case on the 18th day of November, 1930. To the declaration the State has plead the Statute of Limitations. The records show conclusively that the claim accrued more than five years prior to the time it was filed with the secretary of this court. Section 10 of the Act creating the Court of Claims provides that every claim against the State cognizable by the Court of Claims shall be forever barred unless the claim is filed with the secretary of the court within five years after the claim first accrued. This statute is mandatory and under its provisions the claim is barred.

An award is therefore denied and the case dismissed.

(No. 1739—Claim dismissed.)

WARREN E. MOORE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 5, 1932.

DISMISSAL—*when case will be dismissed upon motion of claimant.* Where it appears that there is no reason why the cause should not be dismissed, the case will be dismissed upon motion of claimant.

Per Curiam:

Now on this 6th day of December, A. D. 1932, comes the complainant, Warren E. Moore, with his motion in writing asking the court to dismiss his case.

The court being fully advised in the premises hereby dismisses the above case and grants the motion of the complainant.

(No. 1892—Claimant awarded $191.29.)

FRANKLIN COUNTY COAL COMPANY, INC., Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 5, 1932.

ESSINGTON & MCKIBBEN, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

MATERIALS AND MERCHANDISE—*when award will be made.* Where it clearly appears that materials have been sold, delivered to and used by State department and have not been paid for, award will be made therefor on claim made in apt time.

MR. JUSTICE THOMAS delivered the opinion of the court:

The declaration and stipulation of facts filed in this case show that the claimant, Franklin County Coal Company, Inc., a Delaware corporation licensed to do business in Illinois, submitted to the Division of Purchases and Supplies of the Department of Purchases and Construction of the State of Illinois a certain proposal to supply coal to the State, which proposal was duly accepted by the State. The claimant on that contract shipped on May 7, 1931, 97,200 pounds of coal, constituting one carload, to St. Charles School for Boys, which was delivered and accepted by said school on or about May 8, 1931, and that the contract price was $1.90 per ton, a total of $92.25 plus freight charges of $2.04 per ton, a total of $99.04, making a grand total payable on the shipment of coal of $191.29. The claimant promptly submitted its bill, but for some reason the bill was not approved until after the appropriation was exhausted to pay the same. The State received the coal and the bill is due the claimant and unpaid.

There appears to be no question that this is a just claim and should be paid.

We, therefore, recommend that an award be made to claimant in the sum of $191.29.

(No. 1988—Claim denied.)

NELLIE TURNER, ASSIGNEE AND WIDOW OF LIGE W. TURNER, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 5, 1932.

CHARLES T. THOMPSON, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

LIMITATIONS—*when plea of Statute of Limitations will be sustained.* Where record conclusively shows that claim accrued more than five years prior to the time it was filed with Secretary of State, plea of Statute of Limitations will be sustained.

MR. JUSTICE THOMAS delivered the opinion of the court:

Claimant is the widow of Lige W. Turner, deceased, who was sheriff of Saline County in 1926. On July 12, 1926 Turner and Charlie Wiggins, one of his deputies, went to Jacksonville, Florida, to get Edgar Mayes, a fugitive from justice charged with murder in Saline County. The expenses in going after Mayes and returning him to Saline County for trial are alleged to have been $243.75. A claim for that amount was presented to the county board of Saline County by claimant on January 3, 1931. The county board refused to allow the claim on the grounds that it was a charge against the State, and on September 21, 1932, claimant filed her declaration in this court asking for an award against the State for the amount of the claim. To the declaration the State has plead the Statute of Limitations.

The record shows conclusively that the claim accrued more than five years prior to the time it was filed with the secretary of this court. Section 10 of the Act creating the Court of Claims provides that every claim against the State, cognizable by the Court of Claims shall be forever barred unless the claim is filed with the secretary of the court within five years after the claim first accrues. This statute is mandatory and under its provisions the claim is barred.

An award is therefore denied and the cause is dismissed.

(No. 1277—Claim dismissed.)

MILWAUKEE BRIDGE COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1933.

DISMISSAL—*when case will be dismissed for want of prosecution.* Where, upon motion of Attorney General to show cause why case should not be dismissed for want of prosecution and no appearance or response by claimant appears upon the record the case will be dismissed for want of prosecution.

Per Curiam:

On the 8th day of September, A. D. 1931, of this court, an order was entered against claimant to show cause why this case should not be dismissed for want of prosecution.

Now on this 10th day of January, A. D. 1933, nothing appearing of record to show that the claimant made any effort to show cause why this case should not be dismissed, as ordered on the 8th day of September, 1931.

And it further appearing that notice of the order entered on the 8th day of September, 1931, has been given to claimant in the said above entitled cause.

And it further appearing that no appearance or response appears upon the record of said claimant, the court is of the opinion that said claimant is in default.

Therefore, it is the order of the court that said above entitled cause is hereby dismissed for want of prosecution.

(No. 1489—Claim dismissed.)

ELMER E. WAHLS *et al.*, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1933.

DISMISSAL—*when case will be dismissed for want of prosecution.* Where, upon motion of Attorney General to show cause why case should not be dismissed for want of prosecution and no appearance or response by claimant appears upon the record the case will be dismissed for want of prosecution.

Per Curiam:

On the 8th day of September, A. D. 1931, of this court, an order was entered against claimant to show cause why this case should not be dismissed for want of prosecution.

Now on this 10th day of January, A. D. 1933, nothing appearing of record to show that the claimant made any effort to show cause why this case should not be dismissed, as ordered on the 8th day of September, 1931.

And it further appearing that notice of the order entered on the 8th day of September, 1931, has been given to claimant in the said entitled cause.

And it further appearing that no appearance or response appears upon the record of said claimant, the court is of the opinion that said claimant is in default.

Therefore, it is the order of the court that said above entitled case is hereby dismissed for want of prosecution.

(No. 1555—Claim dismissed.)

JOHN WINSTON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1933.

DISMISSAL—*when case will be dismissed for want of prosecution.* Where, upon motion of Attorney General to show cause why case should not be dismissed for want of prosecution and no appearance or response by claimant appears upon the record the case will be dismissed for want of prosecution.

Per Curiam:

On the 8th day of September, A. D. 1931, of this court, an order was entered against claimant to show cause why this case should not be dismissed for want of prosecution.

Now on this 10th day of January, A. D. 1933, nothing appearing of record to show that the claimant made any effort to show cause why this case should not be dismissed, as ordered on the 8th day of September, 1931.

And it further appearing that notice of the order entered on the 8th day of September, 1931, has been given to claimant in the said above entitled cause.

And it further appearing that no appearance or response appears upon the record of said claimant, the court is of the opinion that said claimant is in default.

Therefore, it is the order of the court that said above entitled cause is hereby dismissed for want of prosecution.

(No. 1737—Claimant awarded $35,072.10.)

ILLINOIS CENTRAL RAILROAD COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1933.

GRAHAM & GRAHAM, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

MONEYS ADVANCED ON BEHALF OF STATE—*reimbursement for—when award will be made.* Where the legal and equitable liability of the State, for moneys advanced on its behalf is undisputed and Attorney General recommends allowance of amount claimed therefor an award will be made.

Mr. CHIEF JUSTICE CLARITY delivered the opinion of the court:

This is a claim for money advanced by claimant on behalf of the respondent in compliance with an order of the Illinois Commerce Commission, entered May 5th, 1928, in Case No. 14473 of the Commerce Commission. It appears this order was entered after a fair hearing on an application made by the City of Bloomington for a separation of grade at a point in the City of Bloomington, where the claimants' tracks and right-of-way crosses Oakland Avenue, in said City of Bloomington. It further appears that a subway for the street was contemplated and that the State of Illinois was represented at said hearing by its Attorney General. The construction was ordered to be paid by the Commerce Commission in the manner following: Fifty per cent by the Illinois Central Railroad Company; twenty-five per cent by the State of Illinois and twenty-five per cent by the Illinois Power and Light Corporation and the City of Bloomington. It appears from the record that the construction of said subway was completed to the satisfaction of the State of Illinois Highway Department and that there was no question raised as to the work being done properly and with the proper expenditures. It further appears that the cost of construction has been agreed upon; that the City of Bloomington and the Illinois Power & Light Corporation have paid their proportions of the cost of such structure, under the Commerce Commission order; that the State of Illinois has not reimbursed the Illinois Central for the twenty-five per cent it was ordered to pay by the Commission's order.

The Attorney General filed herein a statement setting forth that there was no argument as to the liability of the State of Illinois and recommends the award being allowed in the sum of $35,072.10. This court in considering this case is of the opinion that this structure was built and constructed under the order of a representative Commerce Commission and that the costs of the structure was within the knowledge of the Highway Department, Commerce Commission and

Attorney General and therefore good faith has been shown that the claimant entered upon this expenditure with proper authority and in fact was ordered to make such construction, as above set forth. This court is further of the opinion that this is a legal and equitable claim against the State of Illinois and one that should not be avoided in view of all the facts and circumstances shown in the record herein, and further in view of the fact that the Attorney General has consented to an award as above set forth, this court is of the opinion that in view of the position taken by the Commerce Commission and the order entered by that body and the consent of the Highway Department and the consent of the Attorney General that an award should be entered.

This court, therefore, recommends that an award be made in the sum of $35,072.10 to the claimant and recommends that proper appropriation be made for such payment by the Legislature of the State of Illinois.

(No. 1762—Claim denied.)

GEORGE KATANICH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1933.
Rehearing denied March 6, 1933.

ROBERT E. LARKIN AND ARTHUR H. SHAY, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

RES ADJUDICATA—*when plea of former adjudication will be sustained.* This cause having been heard and decided on May 12, 1927, it will not again be considered and plea of former adjudication will be sustained and cause dismissed.

Mr. JUSTICE THOMAS delivered the opinion of the court:

This claim is for $25,000.00 damages occasioned by injuries claimant alleges he received on May 5, 1926, while assisting in the apprehension of some convicts that had escaped from the penitentiary at Joliet. The State has filed a plea of *res judicata.*

Claimant heretofore filed a claim in this court for the same injuries and on May 12, 1927, and award was entered in his favor for $2,500.00 to compensate him for the injuries he sustained. It is fundamental that a former adjudication con-

cludes a party from another trial of the same cause of action. If that were not true there would be no end to litigation.

The claim is denied and the cause dismissed.

(No. 1774—Claim denied.)

WILLIAM L. LEACH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1933.

HENRY C. WARNER, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

FEES AND SALARIES—*increase of salary of State officer during official term —when claim for denied.* Where salary of State office is increased by legislature, one holding said office for official term at the time is not entitled to such increase of salary during said term.

SAME—*constitutional law.* Section 23 of Article V of Constitution of 1870, providing that the salary of a State officer cannot be increased or diminished during his official term is mandatory and binding upon the legislature and all of the courts of this State.

Mr. JUSTICE ROE delivered the opinion of the court:

This is a claim for additional salary over the amount received by a former Judge of the Court of Claims, Honorable William L. Leach. The additional amount so claimed is Eight Thousand Nine Hundred Twenty-five ($8,925.00) Dollars.

The Attorney General has filed a general and special demurrer to the above claim.

On the 19th of September, 1922, a commission was duly issued to the claimant as a Judge of the Court of Claims, following the appointment of the claimant to said court by the Governor of the State of Illinois, and claimant having qualified for said office, taking and subscribing the constitutional oath of office, the oath having been filed in the office of the Secretary of State.

At the time of receiving this Commission, the salary of a Judge in the Court of Claims was fixed by the Legislature at Fifteen Hundred Dollars per annum.

The Legislature increased the salary of the Judges of the Court of Claims from Fifteen Hundred Dollars to Thirty-six Hundred Dollars per annum by amendment approved June 30, 1925. It is therefore claimed that the claimant herein was

entitled to receive said increase in salary from July 1, 1925, when the salary increase became effective up to and including the date of his resignation from this court, which was the 15th day of September, 1929.

There are three Judges in the Court of Claims of the State of Illinois. Upon the passage of the above salary amendment by the Legislature, two of the said judges tendered their resignations to the Governor of the State, and on or about July 1, 1925, the Governor again appointed them to the Court of Claims and they were again duly qualified and commissioned as Judges of the Court of Claims under the new salary schedule.

For some reason the claimant herein did not follow the same course of action. He was therefore holding office under and appointment made on or about the 19th day of September, 1922, and continued to so hold said office under the appointment then made until his resignation was received and accepted on the 15th day of September, 1929.

There is no doubt from all the facts presented that the claimant was a holdover officer of the State from July 1, 1925, to September 15, 1929, unless he resigned and was reappointed. Section 23 of Article V of the Constitution of 1870 is in part as follows:

"The officers named in this Article shall receive for their services a salary to be established by law, which shall not be increased or diminished during their official terms * * * *"

The official term of the complainant was from date of his appointment until successor was appointed or his resignation was received. No successor was appointed up to and until his resignation became effective. There was no new term of office created under the statute which increased the salaries of the judges of the Court of Claims.

It is with great regret that this court cannot allow a former and fellow judge of this court an amount in salary to which he believes that he is entitled, but unfortunately, as a State officer, he is amenable to the positive prohibition that the salary of a State officer, cannot be increased during his official term. For the reason, therefore, that the claimant was not entitled to any sum in addition to that received by him as his salary during his tenure of office under the laws, and the Constitution of the State of Illinois, the demurrer is sustained and the claim dismissed.

(No. 1822—Claimant awarded $300.00.)

THE COMMERCIAL NATIONAL BANK AND TRUST COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1933.

NOAH GULLET, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

FRANCHISE TAX—*when award will be made for recovery of payment made under mutual mistake of fact.* Where it appears from undisputed facts that franchise tax, in excess of amount due was made through mutual mistake of fact, and Attorney General concedes that claimant is entitled to an award for such excess one will be made.

Mr. JUSTICE THOMAS delivered the opinion of the court:

Claimant is asking for a refund of $300.00 franchise tax erroneously paid the Secretary of State on July 25, 1930. Claimant is a non-resident corporation but did no business in Illinois during the year for which the tax was paid. Its report showed the total amount of its issued capital stock to be $7,000,000.00. The Secretary of State notified claimant that it had been assessed a franchise tax of $500.00 and claimant sent the money to pay the tax. Under the law claimant should have been taxed only $200.00. The mistake was made by the Secretary of State. It is stipulated that the excess tax was paid by mistake and the error was not discovered until after the Secretary of State had turned the money into the State treasury. It is conceded by the Attorney General that the error was a mutual mistake of fact and that claimant is entitled to an award for the excess tax paid.

Claimant is therefore allowed an award of $300.00.

(No. 1912—Claim dismissed.)

BILDERBACK INVESTMENT TRUST, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1933.

BILDERBACK INVESTMENT TRUST, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

MISTAKE OF LAW—*money paid under—pleading.* Money voluntarily paid under mistake of law cannot be recovered and where declaration on its face shows claim is for recovery of same, a demurrer thereto will be sustained and the claim dismissed.

MR. JUSTICE THOMAS delivered the opinion of the court:

Claimant is asking for an award of $30.00 paid by it for an insurance broker's license. The declaration alleges it paid the $30.00 under the impression gained through lack of information that such sum was the correct amount the law required. The Attorney General has filed a demurrer to the declaration. It is apparent from the allegations of the declaration that the money was voluntarily paid. If any mistake was made by claimant, it was a mistake of law and not of fact. It is fundamental that a tax or license voluntarily paid cannot be recovered back. (*Oakford & Fahnestock* vs. *State*, 6 Ct. Cl. 439.) It is also equally well settled in this State that money paid under a mistake of law cannot be recovered back. (*Illinois Merchants Trust Co.* vs. *Harvey*, 335 Ill. 284; *Richardson Lubricating Co.* vs. *Kinney*, 337 Ill. 122; *Oakford & Fahnestock* vs. *State*, *supra.*)

The demurrer is sustained and the cause dismissed.

(No. 1801—Claimant awarded $2,500.00.)
(No. 1802—Claimant awarded $2,750.00.)

PETER C. PACHESA, ADMINISTRATOR OF THE ESTATES OF EUGENE PACHESA AND PETER E. PACHESA, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 11, 1933.

HOMER D. MCLAREN, for claimant.

FRANK M. RAMEY, for claimant.

OSCAR E. CARLSTROM, Attorney General and CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*when award may be made—equity and good conscience.* Where it appears that claimants' intestate were killed in a collision as the result of the gross negligence of an agent of the State, that they were not guilty of any contributory negligence and had no reasonable opportunity to avoid collision causing death, an award may be made upon recommendation of the Attorney General on the grounds of equity and good conscience.

Mr. JUSTICE ROE delivered the opinion of the court:

The claimant, Peter C. Pachesa, Administrator of the Estates of Eugene Pachesa, No. 1801 and Peter E. Pachesa, No. 1802, deceased, claims damages for the death of his two sons, Eugene and Peter E. Pachesa.

It appears that on July 6, 1931, these sons were injured in a collision with a water tank trailer belonging to the State of Illinois and death resulted the same day. With Eugene, aged fifteen years, at the time of the accident were two other boys, a brother Peter E. Pachesa, aged eighteen years, and Edward J. Norkus, also eighteen years of age, who were injured and died soon thereafter on the same day.

Peter C. Pachesa, of Taylor Springs, Illinois, father of two of the boys, was engaged in the business of selling meat and he had sent these boys to East St. Louis in a Dodge Panel Truck for a load of meat. They were returning with the meat and as they neared the town of Hillsboro on State Bond Issue Route No. 16, the collision occurred about nine o'clock a. m. The Dodge Truck, driven by said Peter E. Pachesa, a licensed chauffeur, had just rounded a curve near the foot of a long winding hill. This hill is paved with brick and has about seven and one-half per cent grade. A short way up the hill, Route No. 16, known as Springfield Road, is intersected by Oak Street, which is at or near the western limits of Hillsboro. At the point of the accident the roadway is built on a high embankment and on both sides of the road there is a regulation highway fence.

The water tank trailer, attached to a Ford truck, designated at No. 811-L, belonging to the respondent and being used by the Division of Highways in pavement and jack operations, became detached and swung to the left or south side of the road in the path of the oncoming Dodge truck. The driver of the State Ford truck, Galen Dougherty, states that when he noticed that the trailer was loose, he looked ahead and saw the Dodge truck rounding a curve and approaching the hill traveling east toward him about two hundred yards away. The record discloses that finding himself in this dilemma, he was required to make a quick decision. He either had to turn his truck to the left side of the road and try to stop the onrushing trailer or he had to speed up his truck in order to allow the Dodge truck to swerve to the

north behind his truck and get out of the path of the loaded tank trailer. The State truck driver chose the latter course of action and sped down the hill driving with one hand and waving the other hand and shouting at the boys in the Dodge truck to warn them of the impending danger. In times of crisis, one must sometimes act with lightning rapidity and this is what Galen Dougherty seemed to do in his endeavor to prevent the terrible accident which followed. He testified that his truck was at least fifty feet ahead of the trailer when he passed the Dodge truck and had the boys quickly turned to the north side of the road between his truck and the trailer, they might have been saved. However, the boys were evidently put to a quick decision also at this critical time and the driver of the Dodge truck elected to try to make a turn to the right into Oak Street. However, before the turn could be executed, the trailer was upon them and a terrific smashup resulted.

It seems that both drivers tried to avoid the accident and each made a quick decision and exhibited the best judgment at his command. To say that the collision could have been prevented, had either or both acted differently, is problematical at best. However, the result was most disastrous and distressful. For the deaths of the three boys, damages in the amount of Fifteen Thousand Dollars each is claimed.

As a matter of convenience in the presentation of the three claims counsel hereto agreed to consolidate the evidence and briefs so that facts and arguments arising from the same accident could be considered together.

Before we pass to a consideration of the cases and arguments submitted, there are some important facts to be kept in mind.

The water trailer was attached to the Ford truck by a four-inch U-shaped iron clevis with an iron pin nine inches long passing through the clevis and an iron eye in the tongue of the trailer. A few days before the accident this clevis or coupling had been made new and the iron pin had been lengthened because the State employees had decided after using the truck and trailer several days that the coupling between the Ford truck and the attached water tank trailer was insufficient, could not be trusted and was liable to break. (Abstract, page 16.) Therefore, the foreman of the mud jack operations for the State Division of Highways at this point,

Mr. P. J. Payeur, had ordered a new coupling made by a blacksmith at Litchfield, Illinois. This new coupling had been in use several days before the accident. The State employees had worked on the road at this location for several weeks prior to the accident and knew that there were several long steep hills which the State truck would have to descend and ascend on each trip in bringing water for the mud jack operations. The brakes on the Ford truck were in good shape.

The most surprising and mystifying fact is that when about two-thirds down the hill the trailer became detached and that after the accident had happened, the rear of the State truck was examined and there was the iron pin in its place through the clevis attached to the Ford highway truck. Therefore, no one knows what happened to disconnect the trailer from the truck. One can guess or surmise that the coupling was jolted loose in coming down the hill and after the trailer was detached the iron pin was jolted back into place again.

Counsel for the claimant has stressed the point that this peculiar accident could not have happened if the coupling had contained a cotter pin or some safety device to keep the trailer from becoming detached.

It is therefore, contended that the State employees were negligent in not having the safety device installed when the new coupling was made a few days before this accident occurred.

This court considered that it is so well settled by the courts of Illinois and it has been announced so repeatedly by this court that it is not here again necessary to set forth the many cases which state "that the doctrine of *respondeat superior* does not apply to the State, counties, townships, etc." and the State is not liable for the misfeasance, wrongs, or negligence of its employees, agents or servants. Therefore, this case cannot be considered from the viewpoint of any legal liability on the part of the State of Illinois. In this case, this well established rule would apply. The only question, therefore, to be considered is the one of equity and good conscience, which has here been urged by the counsel for the claimant. The rule in this regard followed by this court is clearly set forth in the cases of *Theodore Stoddard*, et al, No. 1066, 1067 and 1068, Court of Claims Reports, Vol 6, pages 20 and 30.

It has been held by this court that the State should pay claims for damages when the claims are based upon an equitable right. To so base the claims, it has also been repeatedly held that the act of the State's agents must have been grossly careless or wantonly negligent. The question as to whether the above elements were present is very close. Testimony has been offered to show that there was present the fact of apparent gross carelessness or wanton negligence. Testimony has been offered by witnesses for the claimant that the coupling or clevis made without a cotter pin or other safety device was unsafe and that the State's agents in so making the coupling were grossly careless or wantonly negligent in the exercise of their duties. It is true that the State's agent used his best judgment to make the coupling right when he had the iron pin made longer. Evidently it was his judgment that this was sufficient protection. However, he failed to protect life by having a coupling constructed or made which would comply with the ordinary and usual custom. Because he failed to see that a cotter pin was necessary, as was proven by this terrible accident resulting in the death of three boys, was, in our opinion, gross negligence, and, according to his experience, he should have had the coupling made safe.

The evidence before this court shows that immediately after this accident the State Highway Department ordered all couplings in the future to be safeguarded with a cotter pin or other safety device.

There is no doubt the driver of the truck used his best judgment and did the thing he thought would save the boys. We cannot consider him grossly or wantonly negligent. When a person tries to do the right thing to avoid an accident but the facts afterward show that he was mistaken in his decision or judgment he cannot be considered grossly careless or wantonly negligent.

We have very carefully studied the evidence and cases submitted and have come to the conclusion that the statement and recommendation made by the Attorney General is correct. He says that in these cases:

"A full review of the evidence would indicate the presence of the three conditions that would justify an exception to the rule of liability on the part of the State for the acts of its agents, viz.—the existence of that degree of negligence on the part of the agents of the State which can be considered culpable, the absence of contributory negligence in any degree on the part of

the persons injured and in this case killed, there being in the light of all the evidence no reasonable opportunity for them to have avoided the consequences of the collision, and the further proof of serious injury (in this event death ensuing), and on the whole the equity and justice involved and entitled to consideration has led me to the conclusion and judgment that an award should be made in each of these cases.

In view of the above conclusions, without hesitancy, I respectfully recommend to the Court that an award in Claim No. 1801 of $2,500, in Claim No. 1802 of $2,750 and in Claim No. 1803 of $3,500, would not be excessive and would, in my opinion, under all the circumstances be just, equitable and a fair discharge of the moral obligation of the State."

Therefore, upon the recommendation of the Attorney General this court has come to the conclusion that under the rule of equity and good conscience these claims should be allowed. However, we also believe that when an exception is so made that the compensation should be adequate only to and commensurate with humanitarian needs to recompense the claimant for funeral and other necessary expenses caused by the accident. As we have said in other cases this court wishes to be fair to the claimant and consider these cases from a reasonable and equitable viewpoint. However, it must also be mindful that the funds of the State must be safeguarded and the interests and rights of all the People of the State preserved.

The Court of Claims not only has the right to determine whether the claimants shall have compensation but also it has the right to determine the amount of compensation which should be allowed. We believe, therefore, after a consideration of all the facts and circumstances, that these cases come under the rule of equity and good conscience.

In view of the above conclusions we award, in Claim No. 1801, $2,500.00 and in Claim No. 1802, $2,750.00, in full settlement of all claims arising from this accident and recommend that the same be paid.

(No. 1803—Claimant awarded $3,500.00.)

WILLIAM NORKUS, ADMINISTRATOR OF THE ESTATE OF EDWARD J. NORKUS, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 11, 1933.

FRANK M. RAMEY AND HOMER D. MCLAREN, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*when award may be made—equity and good conscience.* The facts in this case are the same as those in Nos. 1801 and 1802, *ante*, and the evidence and briefs were consolidated with same and the opinion in said cases is controlling herein.

Mr. JUSTICE ROE delivered the opinion of the court:

In this case damages in the amount of Fifteen Thousand Dollars ($15,000.00) are claimed by William Norkus, Administrator of the estate of his son, Edward J. Norkus, deceased, age eighteen.

The evidence and briefs having been consolidated in this case with Cases No. 1801 and No. 1802, and the facts and arguments being the same as in the above cases, the finding of this court will be the same. Please refer to the opinion and findings in the cases of Peter C. Pachesa, Administrator of the estates of Eugene Pachesa and Peter E. Pachesa, deceased.

It is therefore also recommended by this court that this claim be allowed and an award is made of $3,500.00 in full settlement of all claims arising from this accident, and recommend that the same be paid.

(No. 1872—Claimant awarded $2,663.90.)

RUSSELL MILLER, BY WILLIAM MILLER, HIS NEXT FRIEND, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 11, 1933.

THOMAS P. SINNETT AND J. HAYS BRITTON, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*when award may be made.* Where the evidence shows that a child of tender years, sustained serious and permanent injuries as the result of stepping into hot tar, which was poured into an expansion point on a State road, by employees of the State and left unguarded and without warning signs indicating the presence and danger thereof, an award may be made for such injuries upon recommendation of the Attorney General.

Mr. JUSTICE THOMAS delivered the opinion of the court:

Claimant is a minor eight years old and sues by William Miller, his next friend. On July 8, 1931, he was walking on the pavement of State Route No. 80, near the Village of Coal Valley and stepped into an expansion point that had just

been filled with hot tar by the road maintenance men and his right foot and ankle were severely burned. He was treated by a local physician and afterwards was taken to the hospital for treatment and there remained for thirty days and then brought home and remained in bed for three weeks.

The evidence shows that the foot was severely burned and that at least twenty-five per cent permanent loss of the foot. The cost of medical attention required in treating the injuries amounted to $75.00 and the hospital bill amounted to $88.90, or a total of $163.90. It is alleged that his injuries are permanent and he asked an award against the State for $10,000.00.

The declaration shows the State with the duty to use reasonable care to keep and maintain the road in a reasonable safe condition for the use of the public travel over it, and avers it did not do so, but wrongfully, carelessly and negligently failed and omitted to display and maintain any rail, guard or warning signal or device at or near the expansion point so filled with the hot tar.

In constructing and maintaining the hard surfaced roads, the State acts in its governmental capacity and it is not required to build them or maintain them in any particular manner. The sovereign acts of the State cannot be brought in question in this or any other court. Claimant contends that equity and good conscience requires that he be compensated by the State for the injury he suffered regardless of the legal liability to do so and bases his argument upon the language of Sub-section 4 of Section 6 of the Act creating the Court of Claims, which gives the court power to hear and determine all claims which the State should in equity and good conscience discharge and pay.

The Attorney General in his statement claims that this case should be considered an exception to the general rule; that the doctrine of *respondeat superior* does not apply to the State and cites the following cases;

McGhee vs. *State*, 4 C. C. R. 144;
Engleman vs. *State*, 5 C. C. R. 242;
Williams vs. *State*, 5 C. C. R. 368;
Stachowiak vs. *State*, 5 C. C. R. 275;
Schnepp vs. *State*, 6 C. C. R. 124;
Hanson, et al. vs. *State*, 6 C. C. R. 548.

The Attorney General on account of the tender age of the injured minor and the extent of his injuries and the exceptions cited in the above cases recommends that the medical and hospital bills of $163.90 be paid and an award of $2,500.00 damages, making a total of $2,663.90 be awarded the claimant.

Therefore, upon said recommendation of the Attorney General an award is hereby recommended in the sum of $2,663.90 in full compensation of damages, medical and hospital bills.

(No. 1972—Claimants awarded $4,000.00.)

MINNIE M. MAYER AND NELLIE C. MAYER, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 11, 1933.

ERNEST STANLEY HODGES, for claimants.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*when award may be made for damages on account of construction of subway under State road.* Where it appears that the construction of a pedestrian subway under State road, subjects property of claimants to an additional easement and interferes with ingress and egress thereto, an award may be made upon recommendation of Attorney General.

Mr. JUSTICE THOMAS delivered the opinion of the court:

This claim is for $10,000.00 damages to the property of claimants alleged to have been caused by the construction of a pedestrian subway under State Aid Road No. 55, in the Village of Homewood in Cook County.

The facts alleged in the declaration and supported by the evidence are substantially as follows: The property of claimants is a vacant lot situated on the east side of and adjoining State Aid Road No. 55, in the Village of Homewood. The property has a frontage of 40 feet on the road and a depth of 123 feet from the center of the road and of 90 feet from its east line. On March 25, 1931, the school board of District No. 153 petitioned the Cook County Board of Commissioners to construct a subway for school children under the road. On May 11, 1931, the County Board passed a resolution providing for the construction of the subway as a 15-d project. On June 2, 1931, the Division of Highways of

the State approved the resolution and on June 15th approved the plans and specifications for the work. On July 15, 1931, the County Board let the contract for the work, which contract was also approved by the Division of Highways on July 30th. The subway was constructed in the month of August following. The subway extended east and west under the road. Stairs lead from the surface down to the subway. The stairway paralleled the front of claimant's property 13 feet. Around the stairway opening in a concrete curb one foot high upon which is constructed an iron railing, the top of the railing being 44 inches above the surface of the ground.

It is alleged that the subway was constructed without any authority from claimants, and that its construction has subjected their property to an easement additional to that of the road and has interferred with, and cut off the right of ingress and egress thereto.

The Attorney General files a demurrer to the original declaration. Then the complaint filed an amended declaration. To this the attorney for the claimant and the Attorney General, entered into a stipulation of facts in the case.

The Attorney General forwarded the declaration in this case to the Division of Highways of the Department of Public Works and Buildings for investigation and report. On January 7, 1933, the Attorney General received the following report from Frank T. Sheets, Chief Highway Engineer, of the Division of Highways:

"Dear Sir:

Following is a supplemental report, which you have requested on the above claim.

The structure referred to is a pedestrian subway built by Cook County under Section 15-D of the Road and Bridge Act. The whole cost of this improvement was borne by Cook County with County funds and County Motor Tax funds. The County Motor Fuel Tax funds were used to retire the contract obligations after the contract was awarded.

The plans and estimates for this work were prepared by Cook County and were examined and approved by the State as provided for by law. After the contract was awarded the construction work was given general supervision by the State Division of Highways. The section has been accepted for 100 per cent maintenance by the State.

The underpass is underneath a pavement which was built jointly by the State, County and Village of Homewood and which is under 100 per cent maintenance by the State with the exception of that portion built by the Village.

I am returning your file in this matter."

In view of the report of Frank T. Sheets, Chief Highway Engineer, Division of Highways, the Attorney General recommends that claimant be awarded the sum of $4,000.00.

Therefore, the court on the recommendation of the Attorney General recommends an award of $4,000.00 be allowed to claimant.

(Nos. 555-556-565-565A-573. Consolidated—Claims denied.)

THE MICHIGAN CENTRAL R. R. CO., No. 555, THE MICHIGAN CENTRAL R. R. CO., No. 556, THE C. C. C. & ST. L. RY. CO., No. 565, THE C. C. C. & ST. L. RY. CO., No. 565A, THE NEW YORK CENTRAL R. R. CO., No. 573, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Rehearing granted July 19, 1926.
Opinion filed March 6, 1933.

SIDNEY C. MURRAY & MARVIN A. JERSILD, for claimant.

OSCAR E. CARLSTROM, Attorney General; DAVID J. KADYK, Assistant Attorney General, for respondent.

PUBLIC UTILITIES ACT—*when monies paid into State Treasury under, cannot be recovered.* Where an Act under which monies are collected, provides that anyone affected by any order or decision of the body, administering or enforcing same, may appeal to the Circuit Court of a named County and from such court to the Supreme Court of Illinois, for the purpose of having the reasonableness or lawfulness of such order or decision, requiring such payment, inquired into and determined, and that if no appeal is taken, parties affected shall be deemed to have waived right to have merits of controversy reviewed by a court, no award can be made in the Court of Claims for a recovery of such monies, where claimant fails to pursue rights of appeal provided in Act.

LIMITATIONS—*decreasing time within which to bring action.* A change is a limitation law which shortens time within which a remedy may be invoked is valid, if a reasonable time remains to enable parties having causes of action to invoke the remedy before expiration of new limitation.

SAME—*law as to passed after accrual of claims—retrospective effect.* A retrospective law depriving one of a vested right cannot be enforced, but to come within this principle, the right must be vested, and a claimant has no vested right to sue the State, such right being merely an act of grace which the legislature has the right to take away at any time.

SAME—*Section 10 of Court of Claims Act.* Section 10 of Court of Claims Act is not necessarily a limitation law but was intended to limit the jurisdiction of the Court to claims filed within five years after they first accrued.

MR. JUSTICE THOMAS delivered the opinion of the court:

These claims have been pending in this court for a number of years. They were consolidated for hearing, and on May

19, 1926, all were denied. A petition for rehearing was granted July 19, 1926, and they are now up for final hearing.

All the claims are for the refund of fees paid into the State treasury by claimants under the provisions of Section 31 of the Public Utilities Act. Claimants had made application to the Public Utilities Commission for authority to issue bonds or equipment notes pursuant to the provisions of that Act. After the hearing on the applications the Commission granted the authority asked to each of claimants and ordered that the application "be, and it is hereby, charged an amount equal to ten cents for each One Hundred Dollars of bonds authorized by this order, and the same shall be paid into the State treasury before any of the said bonds shall be issued." This order was in literal compliance with the provisions of Section 31 of the Act. Each claimant paid the amount of fees so assessed against it, and later filed suit in this court asking that the amount paid be refunded.

Claimants base their right to have the fees paid refunded on the ground that the order of the Commission requiring the payment of the fees "constituted an interference with and a burden upon interstate commerce contrary to the Third Paragraph of Section 8 of Article 1 of the Constitution of the United States and constituted a regulation and taxation of the property of claimants and of their business and of the exercise of their functions and of their right to have and use their properties outside of the State of Illinois and the taking of their property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States."

In their statement and argument claimants say: "It was thought by Mr. Harris, Mr. Cary and other attorneys for the claimants that Section 31 would be unconstitutional if construed literally to apply to every railroad company making applications for issues of stocks, bonds and other securities. That if so applied, whether to domestic or foreign corporations engaged in interstate commerce and having lines located outside of the State of Illinois, it would be a burden upon interstate commerce and a tax upon property beyond the jurisdiction of the Commission; and that as applied to a foreign would be a burden upon interstate commerce and deny due process of law and equal protection of the laws.

These views were communicated by Mr. Cary to the members of the Commission before it began to function and were pressed upon the Commission from time to time" etc. It thus appears that the Commission had before it the same questions relative to the legality of the fees assessed against claimants that are presented to this court. The Commission disagreed with the contention of claimants upon these questions and entered the order above mentioned in each case.

The fees paid in compliance with these orders and the dates of payment and of filing claims in this court for their refund are as follows: By the Michigan Central Railroad Co., No. 555, $4,000.00, paid March 25, 1915; suit filed for refund December 19, 1921. By the Michigan Central Railroad Co., No. 556, $8,000.00, paid March 6, 1917; suit filed for refund December 19, 1921. By the Cleveland, Cincinnati, Chicago, & St. Louis Railroad Co., No. 565, $7,000.00, paid June 13, 1914, and $1,725.00 paid January 21, 1915; suit for refund filed March 3, 1922. By the Cleveland, Cincinnati, Chicago & St. Louis Railroad Co., No. 565A, $20,000.00, paid July 3, 1919; suit for refund filed March 14, 1922. By the New York Central Railroad Co., No. 573, $12,762.40, paid March 4, 1920; suit for refund filed April 1, 1922. The total amount of all the fees paid by claimants is $53,487.40.

Counsel for claimants and the State have filed able and voluminous briefs and arguments in support of their respective contentions. In the view we take of the case it is only necessary to discuss two of them.

Claims No. 555 and 565 were not filed in this court within five years after they accrued. Section 10 of the Act creating the Court of Claims provides that "Every claim against the State, cognizable by the Court of Claims shall be forever barred unless the claim is filed with the secretary of the court within five years after the claim first accrues." The State contends this law bars the allowance of these two claims. Claimants contend that as the law was passed after the claims accrued that it does not apply to them, and to apply it would make it retrospective. It is true that a retrospective law impairing the obligation of a contract or depriving one of a vested right cannot be enforced. But the right to come within this principle must be vested. There is no such thing as a vested right in a public law. Claimants had no vested right to sue

the State in this court. The giving of that right was merely an Act of grace which the Legislature has the right to take away at any time. In providing that persons might present their demands against the State to the Court of Claims the Legislature merely established a new method of procedure. It had the right to change the method at any time or to abolish it altogether. In revising the Court of Claims Act in 1917 the Legislature deemed it proper to limit the jurisdiction of the court to claims filed within five years after they first accrued. The time within which a claim must be filed is not a limitation law, and the statute in force at the time the claim is filed is the statute which gives the court jurisdiction to hear the claims. It is manifest, we think, that the Legislature intended by this section to limit the jurisdiction of the court to claims filed within five years after they first accrued. And as these two claims were not filed within that time the court has no authority to allow them. But if Section 10 be held to be a Limitation Act the Legislature had the right to change the time within which claims might be filed if such change did not deprive claimants of a reasonable time in which to file their claims. "The time within which suit shall be brought relates solely to the remedy to enforce the contract, and it may be shortened or lengthened, and changed from time to time, at the pleasure of the Legislature, so long as the creditor is not denied a reasonable opportunity to enforce collection of his debt." (*Drury* vs. *Henderson*, 143 Ill. 315-320.) "When the law only affects the remedy or procedure, the rule in this State is that all rights of action will be enforceable under the new procedure, without regard to whether they accrued before or after such change in the law and without regard to whether the suit has been instituted or not, unless there is a saving clause as to existing litigation." (*The People* vs. *Clark*, 283 Ill. 221-225.) The fees in Claim No. 555 having been paid March 25, 1915, and the Act limiting the time within which to file claims being in effect July 1, 1917, that claimant had the time from July 1, 1917, to March 25, 1920, to file its claim for those fees, a period of over two years and eight months. The fees in claim No. 565 were paid at two different times, the first payment of $7,000.00 having been made June 13, 1914, and the second one of $1,725.00 on January 21, 1915, that claimant had the

time from July 1, 1917, to June 13, 1919, a period of over one year and eleven months, to file its claim for the $7,000.00 paid June 13, 1914; and it had the time from July 1, 1917, to January 21, 1920, a period of over two years and six months, to file its claim for the $1,725.00 paid January 21, 1915. Under any circumstances these periods would be regarded as reasonable times within which to file the claims in this court. "Where a statute of limitations limiting the time within which an Act may be done is modified by changing the time, if such change still gives a reasonable time for the performance of the Act, taking away no vested right, it is a valid law." (*Spaulding* vs. *White*, 173 Ill. 127-131.) Under either view of section 10 claims No. 555 and 565 are barred and no award can be made for them.

The State objects to the allowance of all these claims on the further ground that claimants did not appeal from the order of the Commission requiring them to pay these fees, while claimants contend their failure to take such appeal does not bar this court from making an award for them.

Section 31 of the Public Utilities Act in force at the time these applications were filed with the Commission required the Commission to charge claimants ten cents for every hundred dollars of securities it authorized them to issue. Claimants urged before the Commission that the provisions of this section did not apply to the securities which they were asking authority to issue. The Commission held they did apply, fixed the amount of securities each claimant might issue, and ordered the fees paid into the State treasury before they were issued. From these orders claimants prosecuted no appeals but paid the fees as ordered by the Commission. These fees claimants urge were paid under protest and duress. In the view we take of the matter it is not necessary for us to pass upon that question.

The Public Utilities Commission was created by the Legislature to regulate and supervise the public utilities corporations doing business in the State, and in the performance of those duties the Commission was granted extensive powers. Section 68 of the Act provides that any person or corporation affected by any order or decision of the Commission may appeal to the Circuit Court of Sangamon County for the purpose of having the reasonableness or lawfulness of such order

or decision inquired into and determined. This section also provides that when no appeal is taken the parties affected by such order or decision shall be deemed to have waived the right to have the merits of the controversy reviewed by a court. It is manifest from the provisions of this statute that the Legislature intended to make the orders and decisions of the Commission final unless the parties affected thereby appealed from such orders or decisions to the Circuit Court of Sangamon County to have the lawfulness of the orders or decisions determined by that court. Section 69 of the Act provides for appeal to the Supreme Court from the decision of the Circuit Court of Sangamon County by any party to the action. These provisions of the Act preserve to all persons affected by the decisions of the Commission the right to have the lawfulness and reasonableness of its decisions reviewed and corrected by the courts. If claimants felt that the orders of the Commission requiring them to pay these fees were unlawful they should have taken the steps provided by the statute to have the lawfulness of the orders determined by the Circuit Court of Sangamon County. Not having done so they will be deemed to have waived the right to have the question reviewed by any other court. Such is the plain language of the statute.

Claimants urge that notwithstanding their failure to appeal from the decisions of the Commission the Court of Claims has jurisdiction to pass upon the question of the lawfulness of the decisions of the Commission and, if it finds them to be unlawful, to make awards in their favor for the refund of the fees paid. We cannot agree with this contention. We must accord to the decisions of the Commission the strength due to the judgment of a tribunal appointed by law, and its decisions will stand until they are reversed by a court having jurisdiction to review them. (*Palmyra Co.* vs. *Modesto Co.*, 336 Ill. 158-165; *Alton & Co. R. R.* vs. *Vandalia R. R. Co.*, 271 Ill. 558-565.) Under the statute only the Circuit Court of Sangamon County had jurisdiction to review these decisions. The jurisdiction of that court not having been invoked by appeal as the statute provides the decisions stand, and this court has no power to nullify them.

The State is sovereign and cannot be sued in any of the courts constituting the judicial department of the govern-

ment. But it can enter into contracts and create liabilities which it may be legally obligated to pay. Out of such contracts and obligations disagreements and disputes may arise between the State and the other parties thereto necessitating the determination of questions of both law and fact. To provide a forum for the determination of such questions the Legislature created the Court of Claims. But it is clear the Legislature did not intend the Court of Claims should take jurisdiction of matters the determination of which had been devolved upon other agencies. It was only created to hear claims and demands against the State for which no other forum had been provided. Any other construction of the powers devolved upon the Court of Claims would give it jurisdiction to review the decisions of all agencies of the State in all matters involving moneys due to or from the State. Certainly the Legislature never intended to confer such powers upon this court.

It is settled by a long line of decisions that the Court of Claims will not review the orders of officers, boards and commissions made pursuant to powers devolved upon them by the Legislature, or grant awards where claimants had a remedy by appeal to the courts of general jurisdiction which they failed to pursue. The following are a few of the many cases announcing this rule. (*Bassett* vs. *State*, 2 Ct. Cl. 372; *Mayer* vs. *State*, 3 St. Sl. 34; *Bolton and Smith* vs. *State*, 4 Ct. Cl. 104; *Toeder* vs. *State*, 5 Ct. Cl. 400; *Linden* vs. *State*, 5 Ct. Cl. 150; *Moline Plow Co.* vs. *State*, 5 Ct. Cl. 277; *N. Y. Ch. & St. L. R. R. Co.* vs. *State*, 6 Ct. Cl. 481; *Western Electric Co.* vs. *State*, 6 Ct. Cl. 414; *Anton* vs. *State*, 6 Ct. Cl. 115.) It follows from the views herein expressed that claimants are not entitled to have this court make awards for the refund of the fees alleged to have been paid. The claims are therefore denied and the cases dismissed.

(No. 1176—Claim denied.)

MARX & HASS CLOTHING COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 6, 1933.

WARREN H. ORR AND JOHN D. WHEELOCK, for claimant.

OSCAR E. CARLSTROM, Attorney General; DAVID J. KADYK, Assistant Attorney General, for respondent.

PLEADING—*when demurrer will be sustained—franchise tax.* Where claim is filed for refund of franchise taxes, paid under law afterward declared unconstitutional and declaration filed shows same were voluntarily paid, demurrer will be sustained and case dismissed.

Mr. JUSTICE THOMAS delivered the opinion of the court:

This claim is for the refund of $1,000.00 franchise taxes alleged to have been paid under the provisions of sections 107 of an Act in relation to corporations for pecuniary profit, approved June 20, 1919. This sum, it is alleged, was paid as follows: $200.00 in the year 1922, $200.00 in the year 1923, $200.00 in the year 1924, $200.00 in the year 1925, and $200.00 in the year 1926, said sums being in payment of the franchise taxes assessed against by the Secretary of State for those years, respectively. It is also alleged that after the payment of these taxes and before the filing of this claim said Section 107 was found and declared to be unconstitutional by the Supreme Court of Illinois, and that in equity and good conscience the State should refund to claimant the amounts as paid by it. There is no allegation in the declaration that the taxes were paid under protest or duress. So far as the declaration shows the taxes were all voluntarily paid. The State has filed a demurrer to the declaration.

It has long been the settled law that taxes voluntarily paid cannot be recovered back in the absence of a statute providing for such recovery. (*Oppenheimer & Co.* vs. *State*, 6 Ct. Cl. 465; *Richardson Lubricating Co.* vs. *Kinney*, 337 Ill. 122.) The fact that the law under which the taxes were collected was later held to be unconstitutional gives claimant no right to have them refunded. It was under no obligation to pay the taxes if they were illegal. Claimant is presumed to have known the law, and if it paid the taxes is the belief the law under which they were assessed was valid it cannot now assign its mistake as a reason for having them refunded. (*Oakford & Fahnestock* vs. *State*, 6 Ct. Cl. 439, and cases there cited. See also *Western Electric Co. Inc.* vs. *State*, 6 Ct. Cl. 414.) As the declaration wholly fails to state a cause of action against the State the demurrer must be sustained.

It is therefore ordered that the demurrer be and the same is sustained. As the admitted facts show claimant is not entitled to any award the claim is denied and the case dismissed.

(No. 1527—Claim dismissed.)

WILLIAM WRIGLEY, JR., CO., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion dismissing claim filed September 14, 1932.
Opinion on motion to vacate order of dismissal filed March 6, 1933.

PAUL O'DONNELL, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

DISMISSAL—*when case will be dismissed for want of prosecution.* It is the duty of claimants to prosecute their claims with reasonable diligence, and when claimant fails to do so and an order is entered upon it to show cause within a reasonable time, why case should not be dismissed for want of prosecution and cause is not shown, motion of Attorney General to dismiss will be sustained.

MOTION TO VACATE ORDER OF DISMISSAL—*when denied.* Where demurrer is filed to declaration of claimant and it makes no effort to call up same for hearing and has ample time after order to show cause why case should not be dismissed for want of prosecution has been entered upon it to do so, and assigns no reason for its failure, motion to vacate order of dismissal will be denied.

Per Curiam:

Now comes the respondent, by Oscar E. Carlstrom, its Attorney General, and duly moves the court for dismissal, pursuant to an order to show cause entered by this court on the 12th day of January, 1932, wherein the claimant was ordered to show cause on or before September 13, 1932, why the above entitled case should not be dismissed for want of prosecution. And it appearing to the court that sufficient cause has not been shown by claimant, in accordance with the requirement of said order;

It is therefore ordered, adjudged and decreed, that said claim be and is hereby dismissed without award for want of prosecution.

On motion to vacate order of dismissal the following opinion was rendered:

Mr. JUSTICE THOMAS delivered the opinion of the court:

On July 18, 1929, claimant filed its declaration asking for an award of $85,606.26 for initial fees and franchise taxes which it alleges were paid by it in excess of the amount legally due. The award is asked on the grounds that the law under which the taxes were paid was unconstitutional. On August

1, 1930, the Attorney General filed a demurrer to the declaration. No steps had been taken in the case by claimant up to the time the demurrer was filed although it had been on the docket for over a year then. At the January, 1932 session of the court the Attorney General filed a motion for a rule on claimant, to show cause why the claim should not be dismissed for want of prosecution. This motion was allowed on January 12, 1932, and claimant was given until March 8, 1932, to answer the rule. On March 8, 1932, an order was entered giving claimant till the 13th day of September, 1932 to answer the rule. Claimant having failed to comply with the order, on motion of the Attorney General, the claim was dismissed September 12, 1932. On December 2, 1932, claimant filed its motion to vacate the order dismissing the cause and to redocket the case.

Claimant has shown no reason why its motion should be granted. When claims are filed in this court it is the duty of the claimants to prosecute them with reasonable diligence. After the demurrer was filed claimant failed to call the case up for argument on the demurrer but allowed it to rest without any steps being taken by it to have the demurrer disposed of until the January term, 1932. At that term it was given till the March term to show cause why it should not be dismissed, and the time was then extended till the following September term. Claimant made no effort to answer this motion in any way, although given eight months to do so. Under this state of facts claimant is in no position to complain at the dismissal of its case. No excuse has been given by claimant for its failure to comply with the orders to show cause why the claim should not be dismissed, and no reason has been offered for redocketing it, except that the demurrer was still undisposed of. Claimant had eight months after the order to show cause was entered to call up the demurrer but failed to do so, and has assigned no reason for such failure.

While not required to do so under this motion we will say that we have examined claimant's declaration and have arrived at the conclusion that it does not state such facts as warrant an award in favor of claimant. Claimant alleges the taxes were collected under the provisions of an unconstitutional statute. That fact does not entitle claimant to have

them refunded. For a full discussion of the legal questions involved see the following cases: *Sta-rite Hair Pin Company* vs. *State*, 6 Ct. Cl. 436; *Oakford & Fahnestock* vs. *State*, 6 Ct. Cl. 439; *Western Electric Company et al* vs. *State*, 6 Ct. Cl. 414; *Commercials Solvents Corporation* vs. *State*, 6 Ct. Cl. 442; *S. Oppenheimer & Co.* vs. *State*, 6 Ct. Cl. 465;

The motion to vacate the order dismissing the cause and to re-docket the case is denied.

(No. 1553—Claim denied.)

HERMAN L. OHLENDORF, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 6, 1933.

CLARK, YOUNG, BULL & ROOT, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*when award on grounds of equity and good conscience denied.* In order to sustain a claim against the State, for damage to property, alleged to have been sustained by the negligence of its agents or employees, on the grounds of equity and good conscience, it must be proven that the acts of such agents or employees were grossly careless or wantonly negligent.

Mr. JUSTICE ROE delivered the opinion of the court:

The claimant, Herman L. Ohlendorf, claims damages for an injury to his automobile which occured while on Illinois State Highway No. 7 on October 18, 1929. While driving on this highway from Morris to Joliet, he drove his car through the barricades into a hole or depression approximately fourteen inches deep in the roadway, and thereby lost control of his car, which ran off of the shoulder into a fence post. His automobile was damaged but fortunately the claimant was uninjured. For the damage to the car, the claimant has presented a bill in the amount of $106.44.

There is no dispute as to the fairness of the bill presented, but the liability of the State is questioned by the Attorney General.

It seems that this highway had been under repair for about a month prior to the accident. Patches were being made in the pavement and in order to protect travelers, standard warning signs and barricades were erected at the excavated places.

Lanterns and torches were being made. The claim is made that the lantern at the place where the accident occurred was not burning at the hour of 6:15 o'clock p. m. when the claimant's automobile was damaged. The Chief Highway Engineer, in making a report of the accident, which counsel for claimant in their reply brief ask to be considered as part of the record in the case, says that a man was hired to fill, clean and trim the lanterns and torches. He further says that reports had come to his attention that this man was not performing his duty satisfactorily. Therefore, the foreman in charge of the patching crew was instructed to check on the lights early in the evening and again in the middle of the night and was unable to find any irregularities. The engineer further said that he personally found the signs, barricades and lights in first-class condition. Counsel for claimant concede the contention of the Attorney General that the doctrine of respondent superior does not apply to a state in the exercise of purely governmental functions. But counsel do contend that this case should be considered under the principle of equity, good conscience and "simple justice." The rule in this regard, which has been well established by this court, is set forth in the cases of Theodore Stoddard, et al. Nos. 1066, 1067 and 1068, Court of Claims Reports, Vol. 6, pages 29 and 30. To so base a claim, it has been repeatedly held that the act of the State's agent or employee must have been grossly careless or wantonly negligent. In this case, the element of gross carelessness or wanton negligence is lacking. The Chief Highway Engineer certainly did his duty, as did the foreman in charge of the patching crew. The fact that after the accident the caretaker was released does not establish gross carelessness or wanton negligence. It is not "a question of the feeling of the court in this regard" but a plain question of fact and the application of the law in regard thereto. We have very carefully studied the evidence and facts submitted and have come to the conclusion that from all these facts and circumstances, the case cannot be considered as one coming under the rule equity and good conscience.

Therefore, it is recommended by this court that the claim be disallowed, the claim is denied and the case dismissed.

(No. 1607—Claim denied.)

LETHIA V. DERBY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 6, 1933.

HAROLD W. LEWIS, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*negligence of State employee—when no award will be made.* The rule is universal that the State is never liable for the negligence of its agents and employees, unless there is a statute making it so liable and in this State there is no such statute and unless a claimant can show a legal or equitable liability on the part of the State for damages sustained as the result of the negligence of its employee or agent, the Court has no power to make an award.

Mr. JUSTICE THOMAS delivered the opinion of the court:

Claimant is asking $10,000.00 damages for injuries she alleges sustained in a collission between a bus in which she was riding as a passenger and a truck being driven by an employee of the State. The collision occurred April 11, 1929, on West Locust Street, in the City of Quincy, about 9:00 o'clock in the morning. The bus belonged to the Illinois Power and Light Company and the truck was one used at the Illinois Soldiers' and Sailors' Home at Quincy, and was being driven by Chester King, an employee at the Home. It is alleged that the collision was caused by the negligence of the driver of the truck and that her injuries were the direct result of the negligence and want of care of Chester King while employed by the State.

In her argument claimant assumes that the State stands in the same position as an individual or a corporation, and is liable for all damages caused by the negligence of its agents or employees. In this, claimant is in error. The rule is universal that the State is never liable for the negligence of its agents and employees unless there is a statute making it so liable. This rule has been so often announced by this and other courts that it would seem it should now be well known. The following are but a few of the many cases announcing the rule. (*United States* vs. *Kirkpatrick*, 9 Wheaton, 720; *Story on Agency*, 9 Ed. Sec. 319; *Belt* vs. *State*, 1 Ct. Cl. 266; *Johnson* vs. *State*, 2 Ct. Cl. 165; *Schroeder* vs. *State*, 3 Ct. Cl.

36; *Wunderlich Granite Co.* vs. *State*, 4 Ct. Cl. 143; *Janeczko* vs. *State*, 5 Ct. Cl. 244; *McGarrah* vs. *State*, 6 Ct. Cl. 468; *Kinnare* vs. *City of Chicago*, 171 Ill. 332.) Unless a claimant can show a legal or equitable liability of the State of pay the claim filed the court has no power to make an award. In *Johnson* vs. *State, supra,* it was said: "The Commission of Claims is not a bureau of charities, but a court, and under the law creating it must determine all claims in accordance with legal principles." As there is no statute in this State making the State liable for the negligence of its employees it follows claimant is not entitled to an award against the State for her alleged injuries. The claim is therefore denied and the case dismissed.

(No. 1629—Claim dismissed.)

STRESENREUTER BROTHERS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 6, 1933.

DISMISSAL—*when case will be dismissed upon stipulation of parties.* Upon stipulation of parties, because of action satisfied, the case will be dismissed.

Per Curiam:

On this 6th day of March, A. D. 1933, being one of the regular days of the January, A. D. 1933 term, comes the claimant, Stresenreuter Brothers, by their attorneys, Dent, Weichelt & Hampton, and the respondent by its Attorney General, Otto Kerner, and files a stipulation to dismiss the above case.

The stipulation is approved, and the cause dismissed, and in pursuance to said stipulation the claim is dismissed without award, because of action satisfied.

(No. 1644—Claimant awarded $1,750.00.)

LUCINDA J. ALLEN, MOTHER OF EDGAR M. ALLEN, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 6, 1933.

MILLER & SHAPIRO, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made.* Where claimant's intestate received accidental injuries, causing death, arising out of and in course of employment by State, while in extra hazardous occupation, an award will be made under Workmen's Compensation Act.

Mr. JUSTICE ROE delivered the opinion of the court:

This is a claim instituted by Lucinda J. Allen, mother of Edgar M. Allen, Deceased, to recover compensation under the Workmen's Compensation Act for the death of her son, which occurred on June 16, 1930. At the time of his injury, the said Edgar M. Allen was employed by the State of Illinois as a laborer on State Route No. 13. While working in the course of his employment setting up road forms for a concrete paving operation near Murphysboro, a dump truck owned and operated by the respondent, which was loaded with gravel, backed in toward a mixing machine used on this highway. At the time, the deceased was bending low, working on the road forms at the point where the dump truck backed in. The driver of the truck did not see this laborer at his work and as he backed the right rear wheel of the dump truck knocked the deceased over against the forms and pinned him beneath the wheels. Just at this time the driver noticed what happened and attempted to drive the truck forward, but in some manner, the truck rolled back onto the injured laborer, and he died from the injuries thus received at St. Andrew's Hospital at Murphysboro where he had been taken.

There seems to be no dispute as to the material facts concerning this accident.

The deceased had been employed steadily by the Department of Highways for one year prior to the accident. The evidence further shows that during this period of time, he had helped to support his mother, who was past seventy years of age.

Claimant was injured while working as a laborer setting up road forms for concrete paving on a State highway, and his injury arose out of and in the course of his employment which is classified as extra-hazardous under the Workmen's Compensation Act.

Claude G. Van Hoorbeke vs. *State*, 5 C. C. R. 337.

The deceased, Edgar M. Allen, had contributed $40.00 per month toward the support of his mother, Lucinda J. Allen, the claimant herein. He had worked a year prior to the acci-

dent and received as pay approximately $26.53 per week. The evidence tends to show that the claimant was not totally dependent upon the earnings of her son, Edgar M. Allen. She has six children now living, the youngest of them being thirty-five years of age.

We believe the claimant is entitled to compensation and that the compensation which should be paid comes under section 7(c) considering the fact that the claimant was partially dependent upon the support of the deceased.

The claimant, therefore, is awarded the sum of One Thousand Seven Hundred Fifty Dollars ($1,750.00) in full compensation for the injury sustained by her son, Edgar M. Allen, and this court recommends that she be allowed this sum.

(No. 1744—Claim denied.)

HARRIETTE L. THOMPSON, ADMINISTRATRIX OF THE ESTATE OF WARD E. THOMPSON, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 6, 1933.

ANDREWS & ESSINGTON, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*when State not liable for personal injury sustained by State employee.* The fact that a State employee received injuries causing his death, while engaged in the performance of his official duties, will not of itself entitle claimant to an award, and unless he can bring himself within the provisions of some law justifying it, his claim must fail, as Court has no power to make award unless facts show a legal or equitable claim against the State.

WORKMEN'S COMPENSATION ACT—*employment not extra hazardous—pleading, when demurrer sustained and case dismissed.* Where declaration shows that member of Board of Pardons and Paroles received injuries causing his death by reason of automobile in which he was riding leaving road and striking pole, while on way to attend meeting of Board, a demurrer thereto will be sustained, and case dismissed, deceased at the time of such injury not being engaged in extra hazardous employment as defined in Act.

Mr. JUSTICE THOMAS delivered the opinion of the court:

Claimant brings this action for $10,000.00 damages as administratrix of the estate of Ward E. Thompson, deceased. The deceased was a member of the Board of Pardons and Paroles. On January 4, 1931, while on his way to attend a

meeting of the board at Joliet the automobile in which he was riding left the road and crashed into a pole. As a result deceased received injuries from which he died on January 8th following. He left a widow and two children surviving him, for whose benefit this action is brought. In addition to the above facts the declaration charges that the injuries causing the death of deceased arose out of and in the course of his employment, and also that an award be made under the provisions of the Workmen's Compensation Act. The State has demurred to the declaration.

Before a claimant can have an award against the State he must bring himself within the provisions of some law justifying it, and unless he does so his claim must fail. While in this case deceased was an employee of the State and the injuries that caused his death were received while he was engaged in the performance of his official duties those facts alone do not entitle claimant to an award. The Court of Claims has no power to make an award in any case unless the facts show a legal or equitable claim against the State. (*Schmidt* vs. *State*, 1 Ct. Cl. 76; *Henke* vs. *State*, 2 Ct. Cl. 11; *Thompson* vs. *State*, 4 Ct. Cl. 26; *Perry* vs. *State*, 6 Ct. Cl. 81.) The Workmen's Compensation Act only applies to the State when the State is engaged in some of the enterprises or businesses enumerated in Section 3 of that Act. (*Perry* vs. *State, supra.*) As the deceased was not employed in any business or enterprise of the State declared to be extra-hazardous by Section 3 of the Workmen's Compensation Act at the time he received the injuries causing his death that Act does not apply and claimant is not entitled to an award. The demurrer is therefore sustained and the case dismissed.

(No. 1760—Claim denied.)

Dominic DiCianni, Administrator of the Estate of Salvatore DiCianni, Deceased, *vs.* State of Illinois, Respondent.

Opinion filed March 6, 1933.

Theodore Levin, for claimant.

Otto Kerner, Attorney General; Carl Dietz, Assistant Attorney General, for respondent.

PERSONAL INJURY—*when Court has no jurisdiction.* Under authority of *Perkins, Fellows and Hamilton*, 4 Court of Claims Reports 197, the plea to the jurisdiction of this Court is sustained and claim dismissed.

Mr. JUSTICE ROE delivered the opinion of the court:

The claimant, Dominic DiCianni, Administrator of the estate of Salvatore DiCianni, deceased, claims damages for the death of his brother in the amount of Ten Thousand Dollars ($10,000).

Salvatore DiCianni, a minor, aged fifteen years, was shot while riding as a passenger in an automobile owned by one Frank Amato and driven by one Nick Amato. This automobile was proceeding in a northeasterly direction on Ogden Avenue near the intersection of Washington Boulevard, Chicago, Illinois. The declaration states that Police Officer Thomas B. Chapman, employed by the West Chicago Park Commissioners, shot the deceased while he was riding in the said car. However, the declaration does not give the circumstances under which the deceased was shot. Counsel for claimant asserts in his declaration that the said Thomas B. Chapman shot the deceased without provocation or justification.

To this claim, a Plea to Jurisdiction has been filed in behalf of the State of Illinois.

In the case of *Perkins, Fellows and Hamilton* vs. *State*, 4 C. C. R. 197, the rule is clearly and definitely set fourth that the Court of Claims has no jurisdiction over the suits against Municipal Corporations. Inasmuch as the Supreme Court of our State has decided that the West Park Board of Commissioners is a Municipal Corporation created by an Act of the Legislature in February, 1869, this court is without jurisdiction in this case. Claimant maintains that he is without remedy except in the Court of Claims and seeks award in equity and good conscience. It has been uniformly set forth that this court is of the opinion that the Legislature of this State did not intend to include in the Act creating the Court of Claims any authority to obligate the State of Illinois, either as a matter of law or through equity and good conscience, in cases of this character.

Inasmuch as we believe that this case cannot be maintained in this court, the Plea to Jurisdiction is sustained and the claim dismissed.

(No. 1790—Claim denied.)

ELIJAH F. HAYES, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 6, 1933.

JOE FRANK ALLEN, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*when claim denied.* Where it appears from the evidence that the claim of a member of the Illinois National Guard for personal injuries, alleged to have been sustained in the line of duty, was fairly and favorably passed on by a Board of Inquiry convened in accordance with provisions of The Military and Naval Code and full compensation paid him thereunder an award in this Court will be denied.

SAME—*jurisdiction.* This Court by virtue of the provisions of the Military and Naval Code has jurisdiction in claims made by members of the Illinois National Guard for compensation for injuries sustained while in performance of their duties as such members.

Mr. JUSTICE ROE delivered the opinion of the court:

The claimant, Elijah F. Hayes, a resident of the City of Mount Vernon, Illinois, herewith presents a claim in the amount of $390.50.

On January 3, 1930, he was enlisted as a member of the Howitzer Company, 130th Infantry, in the Illinois National Guard, rating as a private first-class in said organization. During the period from August 2nd to August 16th, 1930, he was ordered to Camp Grant at Rockford, Illinois, for the annual field training. Upon his arrival at Camp Grant, he was detailed by Captain E. C. Jolmson and First Sergeant Lewis Brake to the duty of unloading company equipment from trucks at the tent area to be occupied by the said Howitzer Company. As he was performing this duty, it was necessary for him to unload such heavy equipment that he developed a severe strain, which necessitated his reporting to the regional infirmary for the purpose of treatment. Upon examination by Captain M. E. Baxter, of the Medical Corps, he was ordered to be taken to the Base Hospital at Camp Grant for treatment, being taken there by ambulance. At the Base Hospital, the injury was pronounced to be hernia, left inguinal. The commanding officer of the hospital, after due examination, declined to operate and after a period of two days, the claimant was ordered back to his company for duty. He was instructed by the commander of his organiza-

tion to do no duty that might aggravate the injury. On August 7, 1930, the Board of Inquiry was convened to pass upon the claimant's case. This board heard all the available evidence and took the matter under consideration.

After the claimant returned with his organization to his home at Mount Vernon on August 16th, he found that his condition was growing worse, and upon August 24th, a request for hospitalization and operation was made by his organization commander to the Adjutant General of the State. The claimant further states that authority for the operation was granted by telegram on August 28, 1930, and that he later was allowed disability pay in the amount of $184.50, which amount he received.

The claimant now asks that he be paid for the difference between his loss of salary for eleven and one-half weeks, which was $575.00 and the amount he received from the State, which difference is $390.50.

In this case, the respondent has filed a Plea to Jurisdiction. In view of the general provision of Section 11, Article XVI of the Military and Naval Code, the plea to jurisdiction is overruled.

After careful consideration of all the facts presented, it appears to this court that the claim of the claimant was fairly and favorably passed upon by a Board of Inquiry duly convened on August 7, 1930, in accordance with the provisions of Section 10, Article XVI of the Military and Naval Code. (Par. 142, Chapter 129, Smith-Hurd's Revised Statutes, 1931.)

And it appears to this court that claimant has received full compensation under the above section for the temporary total disability, which is the only claim herein made.

Under the statute full compensation of this claim has been made and therefore the claim is denied and the case dismissed.

(No. 1808—Claim denied.)

WM. WRIGLEY, JR., COMPANY, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 6, 1933.

TROWBRIDGE, LOWRIE, O'DONNELL & JOHNSTON, for claimant.

OSCAR E. CARLSTROM, Attorney General and CARL DIETZ, Assistant Attorney General, for the State.

FRANCHISE TAX—*voluntarily paid cannot be recovered.* Taxes voluntarily paid cannot be recovered unless there is a statute authorizing such recovery.

SAME—*paid under law declared unconstitutional.* Fact that law under which tax was levied or paid is decided unconstitutional does not authorize court to make an award for recovery of same.

SAME—*compulsion—duress.* Payment of tax will not be deemed compulsory or under duress where made to avoid penalties.

SAME—*failure to pursue remedy in courts of general jurisdiction.* A party paying money to public officer under protest has under statute, thirty days within which to file bill in chancery restraining deposit of such money in State treasury and if he does not avail himself of such remedy, payment will be deemed to have been voluntarily paid and cannot be recovered.

MR. JUSTICE THOMAS delivered the opinion of the court:

This action is for the refund of $40,064.40 franchise taxes paid by claimant to the Secretary of State on July 23, 1926. It is alleged the taxes were assessed and collected by the Secretary of State under the provisions of Sections 101 and 105 of the General Corporation Act and that said sections were afterward held unconstitutional by the Supreme Court of Illinois at its June term, 1927. It is further alleged the taxes were paid under protest and that claimant "was induced to make said payment in said year by means of duress and through fear that the State of Illinois would enforce the statute and impose the penalties provided in the statute applying to corporations which fail to pay their franchise taxes." The State has demurred to the declaration.

It is well settled in this State that a tax voluntarily paid cannot be recovered back in the absence of a statute providing for such a recovery. It is also well settled that the fact that the statute under which the tax was levied and collected was unconstitutional will not authorize an action for its recovery by the party paying it. (*Oppenheimer & Co.* vs. *State*, 6 Ct. Cl. 465; *Board of Education* vs. *Toennigs*, 297 Ill. 469.) The fact that the Secretary of State had no legal right to demand the tax and claimant was under no legal obligation to pay it is of no consequence unless the payment was compulsory in the sense of depriving claimant of its free will. (*Ill. Glass Co.* vs. *Chicago Tel. Co.*, 234 Ill. 535; *School of Domestic Arts* vs. *Harding*, 331 Ill. 330; *Western Electric Co.* vs. *State*, 6 Ct. Cl. 414.) And the payment will not be deemed compulsory where it is made to avoid penalties. (*21 R. C. L.* p. 151, sec. 176; *The People* vs. *Brand*, 239 Ill. App. 273; *Oppen-*

heimer & Co. vs. *State*, *supra*.) As there is no statute in Illinois providing for the refunding of illegal taxes claimant is barred of the right to their recovery.

There is another reason why claimant cannot recover. Section 2a of the Act in relation to the payment of the public money of the State into the State treasury provides that every officer shall hold all money paid to him under protest for thirty days before depositing it with the State Treasurer and if the party making such payment shall within such period file a bill in chancery and secure a temporary injunction restraining the making of such deposit such payment shall be held until the final order or decree of the court. This statute gave claimant an opportunity to have the courts of the State decide whether or not the tax demanded was valid. There is no allegation in the declaration that claimant followed the provisions of this law. It is manifest it did not do so. As claimant had an opportunity to have the validity of the tax determined by a court of general jurisdiction and failed to avail itself of that privilege the tax will be deemed to have been voluntarily paid. (*Oppenheimer & Co.* vs. *State*, *supra*; *Richardson Lubricating Co.* vs. *Kinney*, 337 Ill. 122.)

As the declaration does not state such facts as entitles it to a refund of the taxes the demurrer is sustained and the case dismissed.

(No. 1810—Claim denied.)

W. E. O'NEIL CONSTRUCTION CO., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 6, 1933.

W. E. O'NEIL CONSTRUCTION CO., pro se.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

RES ADJUDICATA—*when plea of will be sustained.* This cause having been heard and decided at the January, 1930, term of this Court, it will not again be considered and plea of former adjudication will be sustained and claim dismissed.

Mr. JUSTICE THOMAS delivered the opinion of the court:

Claimant asks an award of $11,364.32 as extra compensation for the construction of the Naval Armory at Chicago.

It charges that in building the armory it was put to extra expense, not contemplated, due to delays on the part of the State and to rise in the water level of Lake Michigan. To the declaration the State has filed a plea of former adjudication.

The claimant filed a claim in this court, based on the same facts and circumstances as this, to the January term, 1930, and upon a hearing thereof the same was denied at the September term, 1930, and a rehearing denied November 12, 1930. (*W. E. O'Neil Construction Co. vs. State*, 6 Ct. Cl. 450.) The cause having once been heard and decided by this court will not be considered again.

The claim is denied and the case dismissed.

(No. 1905—Claim denied.)

RICHARD A. SLATTERY, ADMINISTRATOR OF THE ESTATE OF RICHARD SLATTERY, JR., Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 6, 1933.

LOUIS N. BLUMENTHAL, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*when court has no jurisdiction.* The principles and issues involved herein were discussed and decided in *Perkins, Fellows and Hamilton*, 4 Court of Claims Reports 197, and subsequent cases in this Court.

Mr. JUSTICE THOMAS delivered the opinion of the court:

The claimant, Administrator of the estate of Richard Slattery, Jr., files his claim for $10,000.00 damages and a further sum of $400.00 for doctor bills and funeral expenses for the death and burial of Richard Slattery, Jr. The declaration charges that on May 16, 1931, Richard Slattery, Jr., was playing on a slide in the park located at Thirty-third and Shields Avenue, Chicago, known as Armour Square. That the park was a public park and under the control, supervision and jurisdiction of the South Park Commissioners, a municipal corporation. That the claimant was in the exercise of due care and caution for his own safety and had a lawful right

to be upon said slide. That the South Park Commissioners negligently failed to maintain the slide in a good state of repairs, as a result of which Richard Slattery, Jr., fell from the slide and received an injury from which he died on the 17th day of May, 1931. The State has filed a plea to the jurisdiction of this court setting up that Armour Square is under the control and supervision of the South Park Commissioners of the City of Chicago, a municipal corporation. That the declaration fails to aver in what manner the State of Illinois is liable for damages for the death of the said Richard Slattery, Jr. That the South Park Board of Chicago is a municipal corporation and is not a subdivision of the State of Illinois, or any department of the State Government. This court has in former opinions expressed itself as to extending the liability of the State of Illinois in cases of similar nature and the court is of the opinion that the Legislature of the State of Illinois did not intend to include in the Act creating the Court of Claims any authority to obligate the State of Illinois, either as a matter of law or through equity and good conscience to assume obligations of this character. (*Perkins, Fellows & Hamilton* vs. *State*, 4 C. C. R. 197; *Otto Stine, Adm.* vs. *State*, 6 C. C. R. 329.) The Court of Claims in our opinion has no jurisdiction in this case and the case is dismissed for want of jurisdiction.

(No. 1954—Claim dismissed.)

JOE HESLER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 6, 1933.

J. E. CARR, for claimant.

OTTO KERNER, Attorney General, for respondent.

DISMISSAL—*when claim will be dismissed upon motion of claimant.* A motion by claimant to dismiss claim without prejudice may be allowed.

MR. JUSTICE THOMAS delivered the opinion of the court:

J. E. Carr, attorney of record for claimant, comes and files his written motion and moves the court to dismiss the above claim without prejudice.

The motion is granted and case dismissed without prejudice.

(No. 1758.)

Filed May 14, 1931.

CARL LITTLEJOHN *vs.* STATE OF ILLINOIS.

CLAIMANT, pro se.

OSCAR E. CARLSTROM, Attorney General and CARL DIETZ, Assistant Attorney General, for the State.

Mr. JUSTICE THOMAS delivered the opinion of the court:

This claim is for $333.32 balance of salary claimant alleges is due him for teaching at the Northern Illinois State Teachers College at the DeKalb for the years 1923, 1924, 1925, and 1926. The declaration was filed April 22, 1931. The Attorney General has plead the statute of limitations as to the amounts claimed for all the years except 1926. The statute provides that every claim against the State shall be forever barred if it is not filed within five years after it first accrues. This provision of the law prohibits the allowance of the balance of salary claimed for the years 1923, 1924 and 1925.

There is no evidence in the record to warrant the allowance of the balance of salary claimed for the year 1926. Claimant bases his right to recover on the allegation that it has been the custom to pay teachers for each session of the summer school one-sixth of their salary for the regular school year. In support of this he filed with the declaration a statement of his salary for the years 1923 and 1926 and of the amounts paid him each year for teaching at the sessions of the summer school. This statement shows he was paid $400.00 for each session of the summer school during each of these years or $800.00 per year in addition to his regular salary. The statement further shows that for the year 1926 the payment of $400.00 for each summer session was by special agreement.

It follows he is not entitled to an award, and the claim is denied and the case dismissed.

(No. 1758.)

Filed May 3, 1932.

CARL LITTLEJOHN *vs.* STATE OF ILLINOIS.

OSCAR E. CARLSTROM, Attorney General and CARL DIETZ, Assistant Attorney General, for the State.

MR. JUSTICE THOMAS delivered the opinion of the court:

After a careful consideration of the petition for a rehearing in the above case we find nothing in the petition that was not carefully considered and passed on by the court in the original opinion in this case.

The decision heretofore rendered in this case is therefore affirmed and the petition for rehearing is denied.

(No. 1983—Claim denied.)

LILLIAN STURROCK, ADMINISTRATRIX OF THE ESTATE OF ALEXANDER STURROCK, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 6, 1933.

GEORGE M. KELLOGG, JR., AND IRVIN R. MCCLELLAN, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*negligence of employee of charitable institution—when State not liable—governmental function—respondeat superior.* In the conduct of a charitable institution the State exercises a governmental function and is not liable to respond in damages for the negligence of its officers, agents or employees and the doctrine of *respondeat superior* does not apply.

PLEADING—*when demurrer will be sustained.* Where declaration fails to show cause of action, demurrer will be sustained.

Mr. JUSTICE THOMAS delivered the opinion of the court:

Claimant is asking for an award of $8,000.00 for the death of her son Alexander Sturrock. The declaration charges that Alexander Sturrock, a feeble-minded boy about the age of 14 years, while an inmate of the Lincoln State School and Colony was so severely scalded while being bathed by another inmate that he died from the effects thereof and that the injuries causing his death were the result of the negligence of those in charge of the school. To this declaration the State has filed a general and special demurrer.

The Lincoln State School and Colony is one of the State charitable institutions, and in maintaining it the State is exercising its governmental functions. It has been held repeatedly that in the conduct of its charitable and penal institutions neither the State nor any of its agencies are liable for damages caused by the negligence of those in charge of or employed in such institutions. (*Hemmerling* vs. *State*, 2 Ct. Cl. 316; *Schaefer* vs. *State*, 2 Ct. Cl. 356; *Dale* vs. *State*, 2 Ct. Cl. 368; *Ryan* vs. *State*, 4 Ct. Cl. 57; *Burghardt* vs. *State*, 5 Ct. Cl. 221; *Pelka* vs. *State*, 6 Ct. Cl. 390.) In the Pelka case, *supra*, we said: "If the purpose of the institution be charitable if it is maintained solely for the benefit of the public, the agency maintaining it and conducting it incurs no liability for the negligence of its officers, servants or em-

ployees, whether that agency be the State, a city, county or private corporation," citing in support thereof *Tollefson* vs. *City of Ottawa*, 228 Ill. 134; *Johnston* vs. *City of Chicago*, 258 Ill. 494; and *Hogan* vs. *Chicago Lying-In-Hospital*, 335 Ill. 42. Many other cases of like import might be cited but we deem it unnecessary. As the declaration show claimant is not entitled to an award the demurrer is sustained and the case dismissed.

(No. 1990—Claim denied.)

WALTER GUERTIN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 6, 1933.

FREYBURGER, BAKER & RICE, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*highways—jurisdiction.* Where claimant sustains personal injuries and damage to his property, while driving on a highway, alleged to have been caused by negligence in failing to properly maintain same, and said highway is not part of the State system of hard roads and not under the direct supervision of the State, but was under sole ownership, control and supervision of the county, Court of Claims is without jurisdiction to make award and plea to jurisdiction will be sustained and claim dismissed.

Mr. JUSTICE ROE delivered the opinion of the court:

The automobile of Walter Guertin, the claimant, was wrecked, the claimant injured and his infant child was drowned on a public highway on the 6th day of April, 1931. The highway extends south from Beaverville in the County of Iroquois. At a place about two miles and one-half south of Beaverville, a bridge is built over a drainage ditch or creek with a narrow approach leading thereto. While proceeding along this highway, the claimant undertook to pass another automobile as he was on the said approach, which had no protection fence or railing, and in so doing his automobile toppled over a twelve foot embankment causing the injuries and death above mentioned, for which he claims damages in the amount of Eleven Thousand Dollars ($11,000.00).

It is contended by the State in a plea to jurisdiction that the highway in question was not taken over by the State and

was under the sole ownership, control and supervision of the County of Iroquois.

While this unimproved highway is a State Aid Road and connects with State Bond Issue Route 116, this does not bring it within the jurisdiction of this court. It is not a part of the State system of hard roads and therefore not under the direct supervision and control of the State.

From all the facts set forth in this case, it is the opinion of this court that the contention of the respondent is correct, and therefore the plea to jurisdiction is sustained and the claim is dismissed without award.

(No. 2025—Claim denied.)

MRS. W. D. BRICKEY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 6, 1933.

MRS. W. D. BRICKEY, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

LIMITATIONS—*when claim barred.* When a claim is not filed within five years after it first accrues, plea of Statute of Limitations will be sustained and case dismissed.

Mr. JUSTICE ROE delivered the opinion of the court:

The claimant, Mrs. J. D. Brickey, claims that there is due her Five Thousand Five Hundred Dollars ($5,500.00) from the respondent for taking care of the University farm.

In March, 1914, Mr. W. D. Brickey and his wife moved into the University farmhouse and remained there until the latter part of October, 1918. During this time, Mrs. Brickey looked after the care of the house where from seven to nine students roomed and boarded. It is claimed by Mrs. Brickey that she had talked to Mr. Felmley of the University at Normal concerning pay for the work that she was doing and that he had told her that the appropriation was not large enough to cover all costs. Mrs. Brickey claims, furthermore, that the dairy on the said place made considerable money and that it could not have been run without her work, and that she should have received a share of the money it brought in. Because of this work carried on by Mrs. Brickey, she claims

that her health was undermined and that she is entitled to a matron's pay during the years that she was on the said farm.

In this case a plea of the Statute of Limitations has been filed on behalf of the State.

Section 10 of the Act creating the Court of Claims provides that every claim against the State coming within the jurisdiction of this court shall be forever barred unless it is filed with the secretary of the court within five years after it first accrues. It appears from the facts set forth in the declaration and exhibits that this claim was not filed within the time required by statute and therefore the plea of the Statute of Limitations is sustained and the case dismissed.

(No. 2034—Claimant awarded $500.00.)

HARRIS DANTE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 6, 1933.

HARRIS DANTE, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

FEES AND SALARIES—*when award will be made for unpaid salary.* Where it appears that claimant has salary due for services performed, which was not paid because of appropriation therefor being exhausted, an award will be made upon recommendation of Attorney General.

Mr. JUSTICE ROE delivered the opinion of the court:

The claimant, Harris Dante, claims that there is due him as Secretary of the Illinois Commission on Election Laws, the sum of Five Hundred Dollars ($500.00) in back salary. It is further claimed that as such secretary he received a salary of Four Thousand Dollars ($4,000.00) per year, payable in monthly installments of $333.33. He received his salary regularly from September 1, 1929 to May 15, 1931. He claims that he continued in this work up to and including June 30, 1931, and that there is a balance of salary of Five Hundred Dollars ($500.00) still due him. He says that the balance so due was not paid because the appropriation for the said Illinois Commission on Election Laws was exhausted and no funds were available for the payment of his salary. The claimant also filed a statement setting forth the amounts paid during the time of his employment from month to month.

From the evidence presented, and upon the recommendation of the Attorney General, we are of the opinion that the claimant is entitled to the salary claimed in the sum of Five Hundred Dollars ($500.00) and recommend the payment of same.

(No. 1675—Claimant awarded $750.00.)

ROBERT GENE WOOD, A MINOR, BY MABLE WOOD, Guardian, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed April 5, 1933.

LEWMAN AND CARTER, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*equity and good conscience—when award may be made for personal injuries sustained by member of Illinois National Guard.* Where the evidence shows that claimant, a member of the Illinois National Guard, while on duty and lawfully performing same, sustained severe and permanent injuries by reason of being struck by his superior officer resulting in fractured skull, causing epilepsy, an award for medical services and expenses may be made, on the grounds of equity and good conscience, although the State is not legally liable.

Mr. JUSTICE ROE delivered the opinion of the court:

On July 2, 1930, Robert Gene Wood, a private, first-class in Company A, 130th Infantry, Illinois National Guard, claims that he was assaulted and gravely injured by William C. Timm, the then captain of said Company.

From the evidence herein produced, it seems that on the above date, a drill was held between the hours of eight and nine-thirty o'clock at night. After the drill the claimant became engaged in an altercation with one Dale Nimerick, another member of Company A, and during this altercation, the claimant who had rather pugilistic tendencies, struck Dale Nimerick twice and knocked him down. Immediately thereafter, on his own initiative, he went to the company office in the Armory, where Captain Timm and Sergeant Highberg were working, and reported the assault to the Captain. After asking a couple of questions which were answered very civilly by the claimant, the Captain, who was over six feet tall and weighed much over two hundred pounds, lost control of him-

self and became so enraged that he brutally assaulted this boy, who was five feet six inches tall and weighed less than one hundred forty pounds. The Captain struck him several violent blows on the face and head, blackening his eye, and then picked up a wooden folding chair and struck Claimant Wood, with an overhead swing, on top of the head. The blows with the chair were sufficiently strong, according to the testimony of two other witnesses present, to break the chair and then the Captain picked up a piece of the broken chair and continued striking claimant over the head with it although Wood begged him to stop.

During this altercation, Wood did not strike Timm at all, and there seems to be no doubt that the assault was unwarranted, although the Captain was provoked by claimant's attack on Corporal Nimerick, whom Wood accused of reporting to Captain Timm certain derogatory remarks in regard to Company A, which it was alleged Wood had publicly made.

Seemingly not satisfied with the beating he gave the claimant, the Captain sent for Corporal Nimerick and when Nimerick arrived the Captain directed the two to go to the gun shed and fight it out. Although dazed by the Captain's assault upon him, Wood finally again knocked Nimerick out and was thereafter permitted to go home.

As the result of his encounter with Captain Timm, the claimant was obliged to remain in bed six weeks because of a skull fracture, which extended across the top of the vault of the skull and down on either side some five or six centimeters. The evidence shows that as a result of this skull fracture, the boy has developed epilepsy of the post traumatic type and that the epileptic attacks are gradually becoming more frequent, and therefore young Wood has been unable to either go to the University of Illinois as he had intended or to seek any gainful occupation.

There is generally two sides to every case. On one side we find Private Wood, a quick tempered and somewhat obstreperous individual with a reputation as a fighter, had assaulted and knocked a fellow member of his Company.

On the other side, we find Captain Timm provoked not only by the public criticism of the local guard unit which it was alleged that Wood had made, but also by his attack on Corporal Nimerick for reporting it.

Studying the affair from an unprejudiced viewpoint, it seems clear that the Captain, a man forty years of age, large and strong and who should have been a man of mental poise, was not sufficiently provoked for his unwarranted attack upon a much smaller lad of eighteen years.

The question therefore arises whether the State is either legally or in equity liable for this attack. It is clear to the court that the assault was brutal and most highly censurable, and the results therefore lamentable. The actions of the Captain resulted in his resignation from the Illinois National Guard. A Military Board of Inquiry, following an investigation of July 13, 1930, found Captain William C. Timm guilty of conduct unbecoming an officer and a gentleman and his resignation was requested on August 12, 1930 by the Adjutant General. On August 19th, his resignation was received and his services thereby terminated.

From all the evidence presented, it is clear that the assault complained of, which occurred about ten o'clock p. m. and the injuries inflicted, did not arise while the claimant was on duty and lawfully performing same. (See Par. 142-143, Chapter 129, Cahill's Ill. Revised Statutes, 1931.)

It is the opinion of this court that there is no legal liability in this case on the part of the State. However, it is a deplorable case. That the State is not liable for ultravires acts of a State militiaman is set forth in the case of *Minnie McGhee* vs. *State of Illinois*, 4 C. C. R. 144.

Although this court has consistently held that in such cases there is no legal liability on the part of the State, it has recognized the necessity and fairness of considering cases arising out of extraordinary conditions in the light of equity and good conscience.

It is not the intention in such cases to establish a precedent obligating the State of Illinois under similar conditions. However, because this is a particularly unfortunate case, it is the opinion of the court that as a matter of equity and social justice, that the claimant be allowed some compensation for actual expenses incurred. It is not the intention of this court in recommending such an allowance, to fully compensate the claimant for the loss sustained.

In conformity therefore, with the well established rule of this court wherein particular cases warrant the consideration of equity, the claimant is awarded the sum of Seven Hundred

Fifty Dollars ($750.00) for medical services and expenses and it is recommended that he be paid this amount through his guardian, Mabel Wood, in satisfaction of all claims against the State of Illinois.

(No. 1679—Claim denied.)

J. A. KIRBY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 5, 1933.

HARRIS & HARRIS, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

DAMAGES—*when no award will be made for damages for discharge of member of faculty of Western Illinois Teachers College.* Where the evidence shows that the discharge of a member of the faculty of Western Illinois Teachers College was fully justified, and that under Act creating College Board of Trustees had right to appoint and remove instructors and officers for proper cause, no award will be made for damages claimed on account of such discharge and no cause of action lies therefor either against the State or the College.

Mr. JUSTICE THOMAS delivered the opinion of the court:

Claimant is asking for an award of $5,000.00 damages he alleges he has suffered because of being discharged from the faculty of the Western Illinois Teachers College at Macomb. He was employed as an instructor in the institution for the year 1929-1930. He alleges he was to teach ten and one-half months, beginning the middle of July, 1929, at a salary of $315.00 per month and was dismissed on August 26, 1929. Claimant has filed no abstract and no brief and argument. We have carefully read the evidence in this case and find that the discharge of claimant was fully justified. Section 12 of the Act establishing the Western Illinois State Teachers College provides: "The board of trustees shall appoint instructors and such officers as may be required in said school, fix their respective salaries, prescribe their several duties, and shall have power to remove any of them for proper cause." It is clear from the evidence in this case that the trustees acted within their powers in discharging claimant, and that he has no cause of action either against the college or the State.

The claim is therefore denied and the case is dismissed.

(No. 1724—Claim denied.)

HERBERT H. PRICE, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed April 5, 1933.

HERBERT H. PRICE, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

NUISANCE—*tubercular cattle—power of State to order destruction.* Cattle infected with a disease, such as tuberculosis, become a public nuisance and the State has the power, if deemed necessary to the public welfare, to order their destruction without compensation to the owner.

WHERE STATE ALLOWS COMPENSATION FOR PROPERTY DESTROYED IN EXERCISE OF POWER—*compliance with Statute.* Where law allows compensation for property destroyed under power of State, on compliance with provisions of a statute, claimant must show such compliance to be entitled to award, and where claimant fails to dispose of tubercular cattle within time fixed by statute enacted for suppression of tuberculosis among domestic cattle an award for compensation allowed by statute will be denied.

Mr. JUSTICE THOMAS delivered the opinion of the court:

Claimant is asking an award against the State for $60.47 to reimburse him for loss sustained on account of the sale of two grade holstein cows infected with tuberculosis. The two grade holstein cows were tested by the State Veterinarian and found to be tubercular. On July 26, 1930 the two cows were condemned and claimant ordered to dispose of them within thirty days as the law provides. The animals were appraised at $215.00. On August 27, 1930 they were shipped to Chicago Producers Commission Association of Chicago, Illinois, and were slaughtered by the Guggenheim Brothers and brought $33.60, resulting in a loss of $181.40. The Bovine Tuberculosis Act, in force July 1, 1929, provides the State shall pay one-third of the difference between the appraised value of a tubercular animal and the proceeds of the sale of the salvage, not exceeding $70.00 for a purebred animal where the United States assists in the eradication of tuberculosis in cattle and two-thirds of such difference, not to exceed $140.00, for a purebred animal where the United States does not cooperate with the State in the eradication of that disease.

Section 8 of that Act provides: "No compensation shall be paid to any person for an animal condemned for tuberculosis, (4) if the owner retains the animal for more than thirty days after it has been adjudged infected with tuberculosis."

Cattle infected with a disease such as tuberculosis becomes a public nuisance and the State has the power, if deemed necessary to the public welfare to order their destruction without compensation to the owner. (*Durand* vs. *Dyson*, 271 Ill. 382; *Mayfield* vs. *State*, 5 Ct. Cl. 226.) And if the State sees fit to limit the amount of compensation it will pay the owner of property destroyed in the exercise of such power or to make payment of compensation contingent upon compliance by the owner with certain imposed conditions no one can question its authority to do so. Under the maxim "the safety of the people is the supreme law" the State had the right to order claimant's animals destroyed without paying him any compensation. Therefore, the statute is so plain it cannot be misunderstood. It provides compensation shall not be paid if the owner retains the animal more than thirty days after it has been adjudged infected. That is the law and this court has no power to change it nor to disregard it. The Legislature deemed thirty days ample time for owners of such diseased animals to dispose of them. There is certainly nothing in this record to show claimant could not have disposed of his cows within the time fixed by the statute. But be that as it may the statute is plain and mandatory and claimant not having complied with its provisions is not entitled to any award.

The demurrer is therefore sustained and the case dismissed.

(No. 1793—Claim denied.)

WILLIAM KENDALL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 6, 1933.

Rehearing denied April 5, 1933.

LANCASTER & NICHOLS, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when applicable to State.* The Workmen's Compensation Act applies to the State, only when it is engaged in any of enterprises enumerated in Section 3 of the Act and therein declared to be extra hazardous.

SAME—*clearing highway of snow not extra hazardous—when award denied.* A person engaged in clearing highway of snow is not maintaining

highway and is not engaged in an extra hazardous occupation, and if injured while so engaged an award will be denied under Workmen's Compensation Act.

Mr. JUSTICE ROE delivered the opinion of the court:

The claimant asks damages under the Workmen's Compensation Act in the amount of $896.00. He was employed as a laborer by the Division of Highways, Department of Public Works and Buildings of the State of Illinois. On March 10, 1931, he was assisting in cleaning off snow from Routes 31 and 102, between Quincy, Illinois and Clayton, Illinois. In going from one snowbank to another, he rode in the truck just back of the driver's seat. In the rear end of the said truck was piled a number of concrete marker posts about seven feet long and about five inches in diameter, each of these posts weighing about two hundred pounds. The posts were being used as ballasts in the operation of the truck and snowplow. While the claimant was so riding, the truck crossed the Wabash Railway tracks and in crossing said tracks, the truck and snowplow hit the rails which were raised about four inches.

It is claimed that the driver of the truck, Ira Cecil, failed to raise the plow in crossing these rails and by reason thereof, snowplow struck the rails, causing the concrete marker posts in the rear end of the truck to slide forward against the claimant. As a result, his right foot, ankle and leg were crushed, his leg being fractured above the ankle and the ligaments and tendons of the leg and ankle were bruised and ruptured.

The claimant says that he was disabled for a period of twelve weeks and was forced to spend $80.00 for doctor's bill in connection with the treatment of said injuries.

He also claims $10.80 per week for sixty-three weeks for partial loss of the use of his right leg. In the report of the District Engineer, it is stated that this item should not be considered on account of the fact that he had been re-employed since June 3, 1931, and that he had been able to perform his duties in such a manner as entitled him to receive the same rate of pay which he received prior to the injury.

Claimant was injured while employed as a day laborer in cleaning snow from a State highway.

The provisions of the Workmen's Compensation Act do not apply to a State employee unless engaged in one of the

extra-hazardous occupations enumerated in Section 3 of the Act. If claimant was so engaged, he would come under Paragraph 1: "The erection, maintaining, removing, remodeling, altering or demolishing of any structure, except as provided in sub-paragraph 8 of this section." In the case of *Claude G. Van Hoorbeke* vs. *State*, 5 C. C. R. 337, this court has held that "a highway is a structure within the meaning of Section 3 of the Workmen's Compensation Act." If in the present case, the work of claimant comes under this Act, it would be in maintaining a structure. Maintain means to preserve or continue in any particular state or condition; to sustain; to keep up; not to suffer to change or decline. Obviously, this means in this instance, to keep the pavement in good repair and condition. The claimant was not aiding in maintaining the highway in this sense. He was assisting in clearing the roadway of snow so as to aid traffic, and not to preserve the physical condition of the pavement. This distinction is clear. For example, if a building was being maintained under this section, it would mean that the building was being kept in repair so that its physical structure would not change or decline. A person sweeping out the building or cleaning snow from the doorsteps certainly would not be considered as employed in maintaining the building within the meaning of Section 3 of the Workmen's Compensation Act. In our opinion, the Legislature did not intend such a broad and far-reaching application of the law.

Therefore, it is recommended by this court that this claim be disallowed.

(No. 1904—Claimant awarded $300.00.)

JOSEPH ANTHONY SAND, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 5, 1933.

JOSEPH ANTHONY SAND, pro se.

OTTO KERNER, Attorney General and CARL DIETZ, Assistant Attorney General, for the State.

SOLDIERS' BONUS—*when award will be made.* **Where claim for soldiers' bonus was made and allowed, and warrant therefor, without knowledge of claimant came into hands of unknown person who forged signature thereon and cashed same, an award for the amount thereof may be made on the recommendation of the Attorney General, even though Treasurer's draft for same has been cancelled.**

Mr. JUSTICE THOMAS delivered the opinion of the court:

This claim is filed pro se by Joseph Anthony Sand, a world war veteran to recover the sum of $300.00 as compensation granted him under the provisions of the Illinois Bonus Act of 1921.

Claimant filed his Claim No. 257,728 on October 17, 1923, with the Service Recognition Board of Illinois, which was allowed in the amount of $300.00 and certified for payment to the State Treasurer, who on July 10, 1924, drew Warrant No. 10,258 in like sum for payment of this claim. This warrant was not delivered to the claimant but came into the hands of a person or persons unknown who forged the signature of claimant and cashed said warrant.

Upon the sworn affidavit of the claimant under date of July 29, 1927, the American Surety Company on November 11, 1927, refunded to the State Treasurer the sum of $300.00 in payment of the loss of respondent. The State Treasurer subsequently issued Treasurer's Draft No. 2521 in like sum, payable to the claimant but was unable to make delivery due to address of claimant then being unknown. The treasurer's draft was retained in the files of the State Treasurer until May 3, 1929 and being unable to deliver the draft to claimant it was cancelled and the amount returned to the Soldiers' Compensation Fund on August 2, 1929. On September 30, 1929 the Soldiers' Compensation Fund lapsed back into the State treasury without claimant having received his just bonus.

The Attorney General recommends that the claim be allowed in the sum of $300.00.

An award is hereby allowed claimant in the sum of $300.00.

(No. 1975—Claim dismissed.)

T. O. OLIVER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 5, 1933.

T. O. OLIVER, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PLEADING—*when demurrer will be sustained.* Where declaration fails to state a cause of action, demurrer thereto will be sustained and claim dismissed.

Mr. JUSTICE ROE delivered the opinion of the court:

T. O. Oliver, of the Village of Metamora, Illinois, on August 20, 1932, was employed by the State of Illinois as a day laborer with a construction gang on State Bond Issue Route No. 116. He claims that he had a team on this work, and that on the above date one of his mares, in stepping over a form, struck a hey, or wire, which severed an artery close to the bone on her right fore leg. Although veterinarians were called upon to stop the flow of blood, the mare died a few hours later.

One Hundred Dollars is claimed as the alleged value of the said mare.

To this claim the Attorney General has demurred.

Under the well established rule of law, that the doctrine of respondent superior does not apply to the State in the exercise of purely governmental functions, it is the opinion of this court that the demurrer should be sustained and the claim dismissed.

(No. 2010—Claim dismissed.)

JOHN KRAMER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 5, 1933.

G. RAY SENIFT AND JOSEPH V. TOOHILL, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

DISMISSAL—*case will be dismissed upon stipulation.* **Upon stipulation of the parties by their attorneys case will be dismissed.**

Mr. JUSTICE ROE delivered the opinion of the court:

The claimant, John Kramer, employed as a laborer on State Highway No. 98 claims damages in the amount of Two Thousand Dollars. On the 11th day of July, 1932, while so employed, he alleges that he was ordered by his foreman to lift and propell a wheelbarrow so heavily loaded with dry gravel that a hernia and rupture of the right groin was produced. Because of this injury, it is claimed that an operation was necessary and that he became liable for medical services and attention in the aforesaid sum.

It has been stipulated and agreed by and between the claimant, by his attorneys, Senift and Toohill, and the State of Illinois, by Otto Kerner, Attorney General, that the cause be dismissed.

It is therefore dismissed, as per the motion to dismiss filed in this court on March 9, 1933.

(Nos. 1746-1748, Consolidated—Claims denied.)

JAMES BAILEY, No. 1746, LITTRELL CLARK, No. 1748, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 2, 1933.

MURRAY MILLER AND RATNER, CHAPMAN & RATNER, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*when award for will be denied.* Where the evidence shows that claimants, one the driver of an automobile and the other riding with him, sustained personal injuries, caused by said automobile being forced off the concrete portion of a State highway and then running into material being used by State department in constructing guard fence, by reason of said driver being blinded by bright lights of oncoming automobile, identity of which is unknown, an award will be denied.

SAME—*negligence—proximate cause.* To entitle a party to recover damages, alleged to have been sustained in consequence of the negligence of another, there must not only be negligence in fact, but such negligence must have been the proximate cause of the injury.

SAME—*torts—joint and several liability.* One is not liable for the act or omission of another and is not a joint tort-feasor, with respect to an act or omission, if it did not participate either directly or by implication of law and which it never ratified or adopted.

Mr. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant James Bailey filed his declaration with the Secretary of State on March 26, 1931, alleging that he received an injury while driving a car on a public highway under the custody and control of the State of Illinois, at Wauconda, Lake County, Illinois, on the 8th day of February, A. D. 1931. This was State Route 176. The accident occurred at about nine o'clock p. m., while he was approaching a curve in the outskirts of Wauconda. The claimant alleges that he was

forced off the concrete onto the shoulder of the road by the action of bright headlights of an oncoming car. He further alleges that the State of Illinois caused to be placed on the outside of the curve, a series of wooden posts sunk into the ground and standing three or four feet above the ground in a row; that they were unlighted and unpainted and he further alleges that agents of the State of Illinois caused to be placed on the road adjacent to the series of posts above described, a large wooden spool of wire which was to be strung between the posts; that the spool of wire weighed fifteen hundred pounds and was extended three feet in towards the center of the road from the posts, and that neither the posts nor the wire was guarded at the time mentioned and no warning lights indicated their existence, and that the same constituted a hazard to persons traveling along and upon the highway. He further alleges that by reason of having been forced off the road, his Cadillac automobile collided with the spool of wire and caused the automobile to turn over four times and was damaged to the extent of Nine Hundred Dollars, and the claimant was injured, taken to a hospital at Libertyville and was compelled to pay out large and divers sums of money for doctor bills, hospital bills, and lost a considerable sum of money by virtue of the fact that he was unable to follow his usual occupation, and claims that he will be permanently disfigured, and has lost the partial use of the fingers of his right hand; that he sustained five broken ribs and miscellaneous glass cuts.

No averment is contained as to the amount of money paid out on account of doctor bills and hospital bills, but there is a general claim of damages in the sum of Seventy-five Hundred Dollars.

At the time of the alleged injury, one Littrell Clark was with James Bailey, and he has also filed a claim for damages on the same date that Bailey filed his claim for damages. He alleges that he was a passenger in the car of James Bailey on a highway in the custody and control of the State of Illinois, at Wauconda, Lake County, Illinois, on Route 176; that he was in the exercise of all due care and caution for his own safety; that the car in which he was riding being driven by James Bailey, was forced off the concrete onto the shoulder

of the road by the action of bright headlights of an oncoming car.

Both claimants alleged that they had never driven over Route 176 *before and* the averment of negligence alleged by Clark were approximately the same as those alleged by Bailey.

Claimant Clark alleged that he sustained a broken leg and has an open ulcer of the leg, concussion of the head, lacerations and glass cuts of the scalp, permanent partial loss of use of the left leg and permanent disfigurement. He was taken to a hospital at Libertyville, spent large sums of money in hospital and doctor bills and lost a large sum by reason of being unable to follow his usual occupations, and sustained damages in the sum of Ten Thousand Dollars.

The two claims were consolidated by the Attorney General in the statement, brief and argument, for the reason that the facts involved in the two cases were the same, the only difference being that Bailey was the owner and driver of the automobile, while claimant Clark was the passenger. The Attorney General takes the position that there was no evidence in either case of the roll of wire belonging to the State of Illinois, nor that which is more important—that any employee or worker for the State of Illinois placed the wire in the position where it was struck by these claimants.

Bailey and Clark each filed separate briefs, contending that the injury was caused by the carelessness of the State employees who were engaged in constructing a fence along a curve in the road. From the deposition of Clark, it appears that he had traveled that road before; that Bailey was traveling from thirty-five to forty miles an hour; that he was riding with Bailey; that he was not paying a great deal of attention to Bailey's driving. Another car was coming from the opposite direction with very bright lights and he "kind of pulled over," saying "got to give this guy plenty of room"; that they were going around a slight curve in the road and hit something, and that was all he knew until he woke up in the hospital; that he averaged One Hundred Seventy-five Dollars a week in his earnings and was here claiming One Hundred Fifty Dollars a week for nine weeks; that he was fairly sure of his salary but not at all sure of commissions; that his suit

and overcoat were damaged and it cost him One Hundred Fifty Dollars.

On cross examination, Clark said that he was not watching the driving of the car at all. On re-direct, he was asked by his counsel if there was anything about Mr. Bailey's driving that would cause him to be ill at ease, and he answered "no," and he was again asked if he was using all due care and caution for his own safety, and he answered that he was. These latter questions call for conclusions on behalf of the witness and he could only testify to facts.

Complainant offered Exhibit 8, which was a letter from C. R. French on the stationery of the Department of Public Works and Buildings, Division of Highways. French signed his name by typewriter as Superintendent of Construction, and in his letter stated that the guard fence being constructed on Route 176 near Wauconda was being done by the State day labor forces under French's supervision. The deposition of Bailey was also taken and offered in evidence, and stated that on the 8th day of February, 1931, he was at Riverside Park Subdivision, seven miles from McHenry, Illinois; that his home was in Chicago and he was returning there that evening on Route 176; that near Wauconda, while driving at a rate of speed of forty to forty-five miles an hour, a car with very bright lights approached him from the opposite direction coming around the turn; that he edged over to the side of the road; that the other man was traveling at about in the center of the road; that the lights of the approaching car blinded him; that he finally drove over to the shoulder of the road and came in contact with a spool of wire while just approaching the curve, and the next thing he recalled was when he woke up about five minutes later in a nearby field. He stated that there was no guard light as a warning on the wire, and that the spindle of wire protruded out of the road three feet, or possibly three and one-half feet; that he did not see it until he was right upon it, too close to make a turn. He did not know whether his car could be repaired or not; that he had not seen his automobile since the accident. On cross examination, he stated that he did know what the object was that he hit; that it protruded out on the right hand side of the road perhaps two and one-half or three feet from the extreme right hand side of the road on the dirt shoulder. He

also stated on cross examination that this protruding object was about the width of an automobile, perhaps five or six feet from the edge of the road; that the lights of his car were burning; that he had bright lights on his car, but it does not appear from the evidence whether the bright lights or the dimmers were on.

There was considerable medical testimony on behalf of both of these claimants. Other evidence was produced to show that the road in question was built by the State of Illinois and that some construction work was being done on the road; that the posts had been put in, but the wire had not been attached thereto; that the wire was all on the spindle; that the posts had been "knocked to pieces." A week later the wire was still there but outside of the ditch and that the spindle of wire was two and one-half feet from the pavement; that the wire and posts had been there about two weeks and a half before the accident.

A witness was produced who stated that he thought it was a State truck, but did not know; that it hauled the wire to the place in question; that the materials had been there for some little time. Other evidence was produced to show that the spool of wire weighed 1,530 pounds; that the wire stood from 40 to 45 inches high and was about 26 or 27 inches in diameter.

Inasmuch as both claimants were injured in the same accident, and under the same state of facts, and are represented by the same counsel, we have elected to consider these cases together, and while it may be inferred from the testimony and all the facts that the roll of wire was placed in the position it was at the time of the accident by agents of the State of Illinois, yet, under the view we take, that is immaterial.

It clearly appears from the evidence that the roll of wire was not upon the usual travelled portion of the highway, but was off the concrete from two and one-half to three feet. Certainly, the State of Illinois could not be expected by any reasonable person to keep the whole road from property line to property line, free of obstruction. The very nature of the facts prohibit this, but it clearly appears from the evidence that the cause of the injury to both claimants was the bright lights of an oncoming car in the middle of the pavement which forced Bailey from the pavement.

If several persons jointly commit a tort, some or all may be sued, jointly or one separately, a tort being in its nature, the separate act of each. But one is never liable for the tort of another, unless they act in concert; and several will not be held to the acts of one without cooperation, or their conduct naturally produced the acts which resulted in injury. Where the acts of different persons are entirely distinct and separate as to any aid, advice, counsel or countenance, from one to the other, there can be no joint liability.

Chicago & Northwestern Ry. Co. vs. *Scates*, 90 Ill. 586.

Yeazel vs. *John T. Alexander, et al.* 58 Ill. 254.

Nothing appears in the evidence that the driver of the approaching car toward claimants was either in the employ of the State or in any way connected with the State of Illinois, and nothing appears in the evidence other than that the acts of those who were putting in the improvement for the State and the driver of the oncoming car, were separate and distinct and not in any way connected and there could not be joint or separate liability.

The evidence does not disclose the name of the driver of the car which was being operated with bright lights.

The maxim of the law here applicable is that in law the immediate and not the remote cause of any event is regarded. In other words, the law always refers the injury to the proximate, not the remote cause.

22 R. D. L. Proximate Cause, Section 3.

Braun vs. *Craven*, 175 Ill. 401.

Manifestly the bright lights on the car approaching the claimants were the proximate cause of the injury.

The petition, therefore, of both claimants for damages will be denied.

(No. 1903—Claimant awarded $3,750.00.)

NANNIE L. DAVIS, ADMINISTRATRIX OF THE ESTATE OF ELI DAVIS, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 2, 1933.

MARK C. KELLER, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made under.* Where claimant's intestate was a watchman and night policeman at Dixon State Hospital and while in the performance of his duties was shot and killed; held that employment was extra hazardous and that injuries causing death arose out of and in course of employment and that an award under provisions of Workmen's Compensation Act is justified.

SAME—*employee.* A watchman or night policeman at a State institution is an employee and not an official of the State.

Mr. JUSTICE LINSCOTT delivered the opinion of the court:

A declaration was filed in the case with the Secretary of State on May 9, 1932, alleging that the deceased, Eli Davis, during his lifetime, was in the employ of the State of Illinois as a night policeman at the Dixon State Hospital, and received compensation therefor in the sum of One Hundred Three Dollars per month, and one meal a day; that he had been employed in such capacity approximately three years, and that on June 14, 1931, he was attempting to arrest Elizabeth Dunn and Nathaniel Moten, who were aiding and abetting one Cleo Long, a patient lawfully committed and confined in the said State Hospital, to escape therefrom, and that Elizabeth Dunn shot and killed said Eli Davis near the entrance of the grounds to the hospital.

The declaration further alleges the arrest, trial and conviction of Elizabeth Dunn, who is now serving her sentence in the State Reformatory for Women at Dwight, Illinois. The declaration avers that decedent left him surviving, Nannie L. Davis, his widow and William F. Davis, a nineteen year old son, and alleges damages in the sum of Ten Thousand Dollars.

The Attorney General filed a statement in this cause on the 21st day of April, 1933, stating facts substantially in accord with the averments of the declaration. The Attorney General has examined the record of the trial court and we are furnished with a stipulation of facts, together with the verdict of the Coroner's Jury.

Although claimant has filed her claim averring damages as at common law, in the sum of Ten Thousand Dollars, her brief filed in support thereof is asking an award under the Workmen's Compensation Act.

The Attorney General recommends that the claimant be awarded a sum not to exceed Thirty-seven Hundred Fifty Dollars under the Compensation Act.

The claimant has filed numerous decisions in the Court of Claims in support of her contention, but none of these cases are, as we view the case, of any assistance to the court. The court has repeatedly said that each case must be decided according to the facts involved in the case. Practically all of the decisions cited in this court are based upon the "equity and good conscience rule."

Section 6 of the Act of 1917 creating the Court of Claims, gives jurisdiction to this court "to hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by any employee of the State, such determination to be made in accordance with rules prescribed in the Act commonly called the 'Workmen's Compensation Act.' the Industrial Commission being hereby relieved of any duty relative thereto." It is therefore mandatory that the liability of the State must be determined in accordance with the rules prescribed in the Compensation Act shall apply automatically and without election to the State and other municipalities therein named, and to all employers and all their employees engaged in any department where certain enterprises mentioned by the statute are declared to be extra-hazardous. The deceased is described as having been a "watchman" and "night policeman." The facts before the court do not set forth specifically what deceased's duties were, except what he was doing at the time he received his fatal injury, which we think fairly brings him within the intent and meaning of the extra-hazardous occupations mentioned in the Act, unless as exempt by further provisions of the Act.

Section 4 of the Act provides that the term "employer" shall be construed, among other things, to mean the State, and Section 5 provides that the term "employee" as used in the Act shall be construed to mean every person in the service of the State and other municipalities therein mentioned, under appointment or contract of hire, express or implied, oral or written, except any totally blind person, any official of the State or of any county, etc.

The question for us to determine then is whether or not deceased was an official of the State, in accordance with the rule announced by the Supreme Court, in the case of the *City of Chicago* vs. *Industrial Commission*, 291 Ill. 23, where a policeman in the City of Chicago was accidentally killed

while attempting to restore a lamp post to its position, wherein it was held that the deceased in that case was an official, and denied compensation, or whether the deceased in the case before us was not an official. Neither counsel has aided us in this regard.

The office of watchman or night policeman was unknown to the common law and does not exist in this State by statute, and *Bullis* vs. *City of Chicago*, 235 Ill. 472, it was held that the office of police patrolman was unknown to the common law.

At the time deceased, Eli Davis, was employed in the Dixon State Hospital at "night policeman" or "watchman," there was no statute in effect creating the office. There being no office, it follows that Davis was not an officer *de jure*. A public office can exist only by force of law and there would be a misapplication of terms to call one an officer who holds no office.

While there is some authority to the contrary, the great weight of authority is to the effect that there can be no officer *de jure* or *de factor* where there is no office to fill. *People* vs. *Knopf*, 183 Ill. 410. *People* vs. *Welch*, 225 Ill. 364. *Norton* vs. *County of Shelby*, 118 U. S. 425.

We therefore conclude that Davis was not an officer of the State of Illinois, and is entitled to compensation under Paragraph A of Section 7 of the Act, and adopt the recommendation of the Attorney General, and an award is hereby made in the sum of Thirty-seven Hundred Fifty Dollars, ($3,750.00).

(No. 2071—Claim denied.)

SOL RASKIN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 2, 1933.

MEYER L. CHERKAS, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PLEADING—*when demurrer will be sustained.* When declaration on its face fails to state a cause of action, demurrer will be sustained.

Mr. JUSTICE VAUSE delivered the opinion of the court:

This is a claim filed by Sol Raskin seeking to recover damages for injuries received from being struck by an auto-

mobile in a public street in the City of Chicago. The declaration in the case sets forth that Raskin was a pedestrian crossing a public street in the City of Chicago and while doing so was struck by an automobile being driven by a police officer of the State of Illinois, and that such police officer was at the time and place of the accident acting in the line of duty in the management and control of the said automobile as a police officer of the State of Illinois.

To this declaration the Attorney General has filed a demurrer. In addition, a stipulation of facts on the part of the attorneys for the plaintiff and the Attorney General has also been filed.

Neither the declaration nor the facts show any liability on the part of the State. It is well settled that the State is not liable for injuries caused by the negligence of its agent or employees, while in the exercise of their governmental duties.

The demurrer is therefore sustained, claim denied, and the case dismissed.

(No. 1732—Claim denied.)

JOHN KRANC, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 15, 1933.

WILLIAM R. MCCABE, for claimant.

OTTO KERNER, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*limitations—when claim will be denied.* **Where no compensation has been paid on account of injury and no claim for compensation has been filed within one year after the date of the injury, claim is barred by limitation under Section 24 of the Workmen's Compensation Act which is binding upon Court, and upon motion of Attorney General, claim will be dismissed.**

Mr. JUSTICE VAUSE delivered the opinion of the court:

This is a claim for compensation arising from accidental injuries alleged to have been suffered by the claimant while an employee of the State of Illinois.

The record shows that the alleged injury was suffered on the 24th day of June, 1929. Claim for compensation for these injuries was filed in this court on March 4th, 1931. The Attorney General has filed a motion to dismiss the claim because

application for compensation was not filed within the time required by the terms of the Workmen's Compensation Act.

Chapter 37, Paragraph 432, Smith-Hurd's Statutes, 1931, defines the powers and duties of this court. This section provides among other things the following:

"(6) To hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by any employee of the State, such determination to be made in accordance with the rules prescribed in the act commonly called the 'Workmen's Compensation Act' the Industrial Commission being hereby relieved of any duty relative thereto."

Under the power and duty granted by the foregoing section, the determination of the liability of the State in this class of cases must be made in accordance with the rules prescribed in the Workmen's Compensation Act. Section 24 of the Workmen's Compensation Act provides among other things:

"Provided that in any case unless application for compensation is filed with the Industrial Commission within one year after the date of the injury or within one year after the date of the last payment of compensation the right to file such application shall be barred."

This limitation is binding upon this court in the determination of the liability of the State for accidental injuries under Paragraph 432, of Chapter 37, above quoted.

There is no claim made in this case that any compensation has been paid by the State on account of this injury and the record affirmatively shows that application for compensation was filed with this court more than one year after the date of the alleged injury.

The motion of the Attorney General to dismiss the claim is therefore allowed and the claim is ordered dismissed.

(No. 1738—Claim denied.)

EARL HARPER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 15, 1933.

WILLIAM R. MCCABE, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when claim for compensation will be denied.* The facts in this case are identical with those in *Kranc* vs. *State*, No. 1732, *ante*, and this claim is denied on the same grounds expressed in the opinion in said case.

Mr. JUSTICE VAUSE delivered the opinion of the court:

This is a claim for compensation arising from accidental injuries alleged to have been suffered by the claimant while an employee of the State of Illinois.

The record shows that the alleged injury was suffered on the 31st day of July, 1929. Claim for compensation for these injuries was filed in this Court on March 18th, 1931. The Attorney General has filed a motion to dismiss the claim because the application for compensation was not filed within the time required by the terms of the Workmen's Compensation Act.

Chapter 37, Paragraph 432, Smith-Hurd's Statutes, 1931, defines the powers and duties of this court. This section provides among other things the following:

"(6) To hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by an employee of the State, such determination to be made in accordance with the rules prescribed in the act commonly called the 'Workmen's Compensation Act,' the Industrial Commission being hereby relieved of any duty relative thereto."

Under the power and duty granted by the foregoing section, the determination of the liability of the State in this class of cases must be made in accordance with the rules prescribed in the Workmen's Compensation Act. Section 24 of the Workmen's Compensation Act provides among other things:

"Provided that in any case unless application for compensation is filed with the Industrial Commission within one year after the date of the injury or within one year after the date of the last payment of compensation the right to file such application shall be barred."

This limitation is binding upon this court in the determination of the liability of the State for accidental injuries under Paragraph 432, of Chapter 37 above quoted.

There is no claim made in this case that any compensation has been paid by the State on account of this injury and the record affirmatively shows that application for compensation was filed with this court more than one year after the date of the alleged injury.

The motion of the Attorney General to dismiss the claim is therefore allowed and the claim is ordered dismissed.

(No. 1750—Claim denied.)

GRANT TIRE COMPANY, INC., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 15, 1933.

MICHAEL EKSTEIN, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

MERCHANDISE—*when claim for denied.* Where evidence shows that claim is for merchandise furnished State between August, 1927, and December, 1928, and that no effort was made to adjust account or file claim therefor until filing of declaration in this Court on March 30, 1931, and that records of department to which goods were alleged to have been furnished fail to disclose any evidence of receipt thereof, or any requisition therefor, an award will be denied.

SAME—*appropriations.* Parties dealing with State are charged with notice that appropriations are made by Legislature to cover expenditures of State departments for a period of only two years and that all claims should be presented before appropriation made for the payment thereof has lapsed.

PUBLIC POLICY—*laches.* Public policy requires that claims against the State be presented within a reasonable time, in order that same may be checked and paid out of proper appropriation and where claimant fails to do so he will be deemed guilty of laches.

Mr. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant is engaged in the retail automobile tire and accessory business in Springfield, Illinois, and claims the sum of One Hundred Twenty-six Dollars and Eighty-five Cents ($126.85) for merchandise purchased from it by the Department of Public Welfare, and for services rendered by claimant in making repairs on automobiles used by the said department, as shown by an itemized bill of particulars attached to the declaration.

The merchandise furnished and services rendered covered a period of time from August 10th, 1927 to December 22nd, 1928. All purchases were made by and services rendered at the instance of R. W. Ide, then Director of the Department of Public Welfare, or his authorized representative. On January 22nd, 1929, Mr. Rodney H. Brandon succeeded Mr. Ide as the director of such department.

Claimant's declaration was not filed until March 30th, 1931. After the filing thereof, the Attorney General requested

an investigation and report from the Department of Public Welfare. Hon. Rodney Brandon, then director of such department, advised "that a search of the records of this department does not disclose any reference to the items mentioned in this claim. There are no requisitions or invoices on file which refer to the items listed, and we are unable to check the invoice numbers. The dates mentioned are all prior to my appointment as director."

The evidence fails to show that any requisition for the merchandise and services in question was ever issued by the Department of Public Welfare, and fails to explain why the claim was not presented in due time, and paid out of the proper appropriation. Claimant was charged with notice of the fact that appropriations are made by the General Assembly to cover the expenditures of each department for a period of only two years, and that all claims should be presented before the appropriation made for the payment thereof has lapsed. If the items in question constituted a proper claim, they should have been paid by the department from its 1927-1929 biennial appropriation, which appropriation did not lapse until September 30th, 1929. There was, therefore, a period of over nine months in which payment of the whole account could have been made by the department, but so far as the record shows, no effort was made to secure an adjustment of the account, or even file a claim therefor, until the filing of the declaration on March 30th, 1931.

Public policy requires that claims of this character be presented within a reasonable time in order that they may be checked by the proper officials, and in order that they may be paid out of the proper appropriations made for that purpose. By its delay in presenting its claim, the claimant in this case has put the State in a position where it is unable to check the same and determine from the records of the proper department whether the merchandise in question and the services claimed to have been rendered were actually received by the State.

It appears from the record, therefore, that the claimant has been guilty of such laches as will bar it from maintaining its claim at this time, and the claim is therefore dismissed.

(No. 1956—Claimant awarded $500.00.)

GEORGE F. MINER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 15, 1933.

ARTHUR L. ISRAEL, for claimant.

OTTO KERNER, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

FEES AND SALARIES—*when award may be made for salary.* Where claimant, a civil service employee of the Department of Agriculture was wrongfully discharged and removed from his position, and upon hearing by Civil Service Commission it was ordered that he be reinstated and paid all back salary, an award will be made for salary provided for such position, for the time lost on account of such wrongful removal.

Mr. JUSTICE VAUSE delivered the opinion of the court:

The stipulation entered into between counsel for the claimant and the Attorney General shows the following to be the material facts in this case. About December 14, 1914, the claimant was certified and appointed to the position of Chief Clerk in the office of the State Food Commissioner (since 1917 Division of Foods and Dairies, Department of Agriculture) and held such office and performed the duties thereof until March 14, 1932. On this date claimant was given a discharge notice by the Director of Agriculture on the ground that he was physically unable to fulfil the duties of the position, but within five (5) days thereafter, claimant filed with the Civil Service Act, a petition for a hearing on the dismissal charges; that a hearing was held by the Civil Service Commission on April 19, 1932, and on May 10, 1932, the Commission rendered an official opinion that the claimant had been discharged for political reasons and ordering claimant reinstated to his position and ordering the Director of the Department of Agriculture and the Superintendent of the Division of Foods and Dairies to cause all back salary to be paid to the claimant; that a copy of the proceedings before the Civil Service Commission was received by the claimant on May 20, 1932, and he reported on that date for work as chief clerk, and continued until July 9, 1932; that claimant has not received from the State or any department thereof his salary as chief clerk for the months of April and May, 1932; that the salary of chief clerk in the Division of Foods and Dairies was fixed

by the regular biennial appropriations for ordinary and contingent expenses of the Department of Agriculture by the Fifty-seventh General Assembly at Three Thousand Dollars ($3,000.00) per annum, and that claimant received his salary at the rate of Two Hundred Fifty Dollars ($250.00) per month prior to April 1, 1932, and subsequent to June 1, 1932; that a verbal demand was made by claimant for such back salary upon the Department of Agriculture; that the Director of the Department of Agriculture on July 1, 1932, sent to the claimant copy of an opinion of the Attorney General which showed that a voucher was issued by the Department of Agriculture, payable to the claimant for salary for the months of April *and May, 1932, from the department's appropriation for extra* help, and the Attorney General's opinion was that payment of such back salary could not be made from a departmental appropriation for extra help; that no further claim was ever presented or any other demand made for the payment of such back salary except as made by the filing of the declaration in this cause.

The chief clerk's salary for the months of April and May, 1932, having been exhausted and the director having no appropriation from which to pay the back salary for the months of April and May, 1932, it was found impossible to comply with the order of the Civil Service Commission requiring payment to claimant of the back salary for the months of April and May, 1932. Under these facts it is the opinion of the court that the claim of the claimant in the sum of Five Hundred Dollars ($500.00), under the facts and circumstances presented in this case, should be allowed, and claimant is therefore awarded and allowed the sum of Five Hundred Dollars ($500.00).

(Nos. 1994-2002, Consolidated—Claimants awarded $7,550.00.)

CHARLES J. SINN, ADMINISTRATOR, No. 1994, MARGARET BEAL ET AL., No. 2002, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 15, 1933.

MANSFIELD & COWAN, for claimants.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*when award will be made for personal injuries resulting in death—Illinois National Guard.* Where claimants' intestate suffer injuries in line of duty resulting in death while members of Illinois National Guard, an award will be made under authority of Military and Naval Code and the Workmen's Compensation Act used as a basis in determining the amount to be allowed.

Mr. JUSTICE LINSCOTT delivered the opinion of the court:

The facts in the above entitled cases, except as hereinafter noted, being the same, we will consider the cases together. Both claimants seek to recover compensation under the Military and Naval Code of Illinois for the death of Private Marshall Beal, aged twenty-four, a member of Company "E", 130th Infantry, National Guard, Peoria, Illinois, and Private Richard J. Sinn, aged thirty, member of the same Company and Infantry, both residing at Peoria, Illinois.

On Sunday morning, July 31, 1932, about 8:00 a. m. both Private Beal and Private Sinn, with certain other members of the Peoria guard units voluntarily assembled, pursuant to custom, at the armory on North Adams Street, Peoria, for the purpose of journeying to the target range for instruction in rifle fire. Certain members of the guard who owned automobiles were requested to carry as passengers, other designated members. Both Beal and Sinn were directed to ride with Private Roland Streitmatter, who was driving his car. Other members of the guard in the same car were Privates Victor Faust and Virgil Meissenheimer. The target range was located at about six miles northwest of the City of Peoria, and while enroute thereto, an accident occurred when Streitmatter drove his car at a high rate into the rear of another car on the same mission which had stopped. The road was narrow and very dusty, and the accident happened at the approach of a sharp curve about a quarter of a mile from the range.

The facts are not in dispute and the Adjutant General of Illinois, C. E. Black, under date of November 2nd, 1932, made the following report to the Attorney General:

"Dear Sir: In reply to your inquiry of October 20th, regarding the facts contained in the declaration of *Arthur Beal, Admr., et al. vs. State of Illinois*, No. 2002, in the Court of Claims, you are informed that on July 31, 1932, Private Marshall Beal, a member of Company "E", 130th Infantry, while on his way to the rifle range, sustained an injury, due to an automobile accident, which resulted in his death.

The record of the Board, which reported the accident, indicates that several cars were proceeding in convoy to the rifle range. As the leading car approached a steep hill, it was met on a sharp turn by another car, which was headed in the opposite direction. The driver of the leading car of the convoy turned his car out in order to avoid a collision. In so doing, his car was forced into the bank on the right side of the road. On account of a cloud of dust, caused by the first car overturning, the cars in the rear of the convoy were unable to avoid piling into the bank. The last car, in which the soldier Beal was riding, crashed into the cars in front of it. It was badly wrecked and the collision resulted in serious injury to three (3) members of Company "E", one of whom was Private Marshall Beal, who suffered a fractured skull and fractured right wrist, from the effects of which he died at 11:05 A. M., August 2, 1932.

The expense for hospitalization and medical care of this soldier has been defrayed by appropriated funds made to this Department."

A similar report was made concerning Sinn, except the Adjutant General included in that report, the recommendations of the board to the effect that upon filing declaration in the Court of Claims for damages for the death of claimant's son, there should be paid to the claimant, the sum of Fifty Dollars ($50.00) per month for each and every month until June 30, 1933.

The expense for hospital and medical care in both cases had been defrayed by appropriated funds made to Adjutant General's Department. It appears from the evidence that the sum of $50.00 per month had been paid by the Adjutant General from his emergency fund covering the period from October 1, 1932, to June 30, 1933; the payment for June not having as yet been made, but it is the intention of the department to make the same.

In the Sinn case, therefore, the sum of $450.00 in full would have been paid by July first.

In the accident, Soldier Sinn suffered a fractured skull, from the effects of which he died at 6:05 p. m. on the day of the accident.

By virtue of Section 11 of the Military and Naval Code, this court has jurisdiction to hear and determine any claim made by the heirs of an officer or enlisted man of the National Guard, killed while performing his duty. The claim in both cases arising against the State is for financial aid or assistance * * * as the merits of each case may demand. It appears from the evidence that both soldiers were in line of duty on authorized detail at the time of the accident resulting

in their deaths. They were both therefore performing their duties as guardsmen in pursuance to orders of the Commander-in-Chief of the Illinois National Guard, and in such cases, this court looks to the Illinois Compensation Act as a basis for fixing the amounts allowed.

In the Beal case, the record shows that the deceased had been gainfully employed at the Keystone Steel and Wire Company of Peoria over a period of several years prior to his death and that he contributed from $40.00 to $50.00 per month to the support of his widowed mother. He left insurance in the sum of $2,000 which was paid to her and therefore emergency payments were not paid to the mother as in the Sinn case. The record shows that his mother, Margaret Beal, aged 63 years, had no independent means at all of any kind or character from which to support herself prior to her son's death and that she was solely dependent upon her son for assistance. There were other children in the family but they had contributed little and most irregularly. The mother owned no property and had lived upon the proceeds of the life insurance policy paid her at the time of her son's death up to the hearing.

The Attorney General recommends that in the Beal case, the claimant be awarded a sum not to exceed $4,000.

In the case of Sinn, it appears that he had been gainfully employed as an accountant and book-keeper with various Peoria firms for about four years prior to his death, earning from $18 to $20 per week, and had contributed to the support of his parents. In this case, the sum of $50.00 per month had been allowed for eight months and another $50.00 would be paid by the Adjutant General's office on July first to take care of emergency needs.

We make the same finding in the Sinn case as we do in the Beal case, with the exception that we deduct the sum of $450.00 from the sum of $4,000, and recommend that an appropriation be made in the Beal case of $4,000 and that an appropriation be made in the Sinn case of $3,550.00.

(No. 2084—Claimant awarded $4,000.00.)

HERBERT B. JAMISON AND CAROLINE G. JAMISON, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 15, 1933.

JACK, IRWIN & SEIDENBERG, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

MILITARY SERVICE—*personal injury—when award will be made for death of member of Illinois National Guard.* An award will be made for the death of a member of the Illinois National Guard who is killed in line of duty.

Mr. JUSTICE VARSE delivered the opinion of the court:

This is a claim for the allowance of damages for the death of claimant's son, Thomas G. Jamison while in line of duty as a private of Company "E", 130th Infantry, Illinois National Guard.

It has been stipulated between the attorneys for the claimants and the Attorney General that the evidence taken on the hearing before the Military Court, which has been duly transcribed and certified to this court, may be duly considered in lieu of depositions which might be lawfully taken and considered in the final determination and decision of this case upon its merits.

In the statement filed by the Attorney General, it is admitted that the claimant in his statement, brief and argument properly states the facts and circumstances surrounding the cause of death.

The undisputed evidence of record discloses that Private Jamison, as member of Company "E", 130th Infantry, Illinois National Guard, at the time of his death on February 8, 1933, was with his Company on active mine strike duty in Christian County, Illinois, pursuant to orders from the Governor of Illinois duly transmitted to the Adjutant General of the State; that while on such duty he was shot and instantly killed by the accidental discharge of an automatic rifle in the hands of another private of the same Company; that at the time of his death private Jamison was where his general orders required him to be and was under the direct orders of his superior officers and was in line of active military duty

under such orders. This court under such circumstances has jurisdiction by virtue of Section 11 of the Military and Naval Code of Illinois to adjust such a claim as the merits of the case may demand.

Considering the evidence and the stipulation of the facts in the above entitled cause, we are of the opinion that the claimants are entitled to an award in this case and that under the circumstances in evidence a reasonable award would be Four Thousand Dollars ($4,000.00).

It is therefore the judgment of this court that claimants are awarded the sum of Four Thousand Dollars ($4,000.00).

(No. 1752—Claim denied.)

J. B. BRUNS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 23, 1933.

WALTER E. LINDGREN, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when no award will be made.* The questions and principles involved herein are the same as discussed and decided in *Crabtree* vs. *State*, No. 2046, *supra*, and the decision in that case governs in the present case.

Mr. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Prior to and on the 12th day of October, A. D. 1929, the claimant was employed as an attendant at the Elgin State Hospital, Elgin, Illinois. He claims that on said date, while in the performance of his duties, he sustained an injury to his right hand by coming in contact with a rusty screen wire, resulting in an infection which necessitated several incisions and resulted in a ninety per cent (90%) loss of the use of such hand; and makes claim for compensation under the provisions of the Workmen's Compensation Act.

The injuries in question were sustained on October 12th, 1929, and the evidence fails to show that any claim for compensation was ever made. The declaration was filed in this Court on March 31st, 1931.

The Attorney General has filed a motion to dismiss the claim for want of jurisdiction on the following grounds, to-wit:

1. The failure of the claimant to make claim for compensation within six months after the accident.

2. The failure of the claimant to file a declaration or application for compensation within one year after the date of the injury; as required by the terms and provisions of Section Twenty-four (24) of the Compensation Act.

The same question was presented in the case of *Elbert J. Crabtree* vs. *State*, No. 2046, decided at this term of court, and a similar motion was presented by the Attorney General. The question involved was thoroughly considered by the court in that case and the court there held that the terms and provisions of the Workmen's Compensation Act, so far as they are applicable, must be considered in cases of this character, the same as though such terms and provisions were incorporated bodily in the Court of Claims Act; and that a compliance with the aforementioned terms and provisions of Section Twenty-four (24) of the Compensation Act is a condition precedent to the right of the claimant to maintain his proceeding in this court.

The court in the decision of this case must be governed by the same principles of law.

The claimant having failed to make claim for compensation within six months after the accident, and having failed to file his application or declaration in this court within one year after the injury, or within one year after the date of the last payment of compensation, this court is without jurisdiction to proceed with the hearing.

IT IS THEREFORE ORDERED, That the motion of the Attorney General to dismiss be sustained, and the claim is hereby dismissed.

(No. 1781—Claimant awarded $1,140.00.)

LYMAN PHILLIPS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 23, 1933.

CHARLES F. FITZGERALD, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

WHEN AWARD MAY BE MADE FOR PERSONAL INJURY SUSTAINED BY MEMBER OF ILLINOIS NATIONAL GUARD IN LINE OF DUTY—*Workmen's Compensation Act.* Where the evidence shows that claimant sustained personal injuries while in the performance of his duties as a member of the Illinois National Guard, an award may be made therefor and the amount computed under the provisions of the Workmen's Compensation Act.

Mr. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant filed his claim with the Secretary of State, August 22, 1932, alleging that on the 3rd day of August, 1929, he was a member of the Tank Company, 33 Division, Illinois National Guard, and on that date was on duty as a member of the Illinois National Guard with a convoy of trucks on the way to Camp Grant from Maywood, Illinois; that they were travelling west on Route 5 in the vicinity of Bartlett, Illinois, when one of the trucks of the convoy stalled on the highway. Claimant and the Sergeant in charge, went back to repair the stalled truck. The truck was parked on the northerly side of said road, facing west and the claimant and the Sergeant parked their car on the south side of the road facing east. After repairing the truck, the claimant started to walk across the cement road and was struck by a car driven by a civilian. He was taken to St. Joseph's Hospital, Elgin, Illinois, suffering from a slight concussion and abrasion of right ear and face, right hip, left shoulder, posterior fractured tibia, and right at the junction of middle lower third; fractured fibula, right upper third and lower third had Blebb's abrasions, covering area of six inches long and four inches wide over area. This report was signed by Major Stett and by Captain Arthur W. C. Hollings. Four days later he was taken to St. Anthony's Hospital, Rockford, Illinois, where he remained for about ten months. After leaving the hospital in Rockford, he was returned to Chicago and placed under the care of Dr. Benedict Aron, and from thence on, he was under Dr. Aron's care. Dr. Aron testified as to the extent of the injuries. His record shows that on August 3, 1929, he saw the claimant at St. Joseph's hospital, Elgin, Illinois, the accident having occurred about 6:30 o'clock a. m. near Bartlett. He was discharged by the doctor on June 30, 1932, various operations having been considered necessary.

Claimant did not bring any action against the civilian who ran into him, and not enough facts were set forth in the

evidence to determine whether or not there would be any liability on the part of the civilian. No question arises about the facts.

To the declaration, the Attorney General, on April 20, 1933, filed a statement, and included therein, that the following payments had been made to the claimant in this case:

By the Federal Government:	
St. Joseph's Hospital, Elgin, Ill.	**$ 36.75**
Pay to Private Phillips during hospitalization...	**165.00**
Total	**$201.75**
By the State of Illinois:	
Medical services	**$ 979.00**
Hospital services	**1,234.00**
Pay	**329.25**
Total	**$2,542.25**

This claim for compensation arises under Section 11, Article XVI of the Military and Naval Code of the State of Illinois, which in part provides that in every case where an officer or enlisted man of the National Guard "shall be injured, wounded, or killed while performing his duty * * * in pursuance of orders from the Commander-in-Chief, said officer or enlisted man * * * shall have a claim against the State for financial help or assistance, and the State Court of Claims shall act on and adjust the same as the merits of such case may demand." (Par. 143, Chap. 129, Cahill's Ill. Rev. Stat. 1931.)

It appears from the evidence that in civil life, the claimant was employed by the Public Service Company, in the capacity of a collector, and received $35.00 per week as compensation therefor. At the time his deposition was taken, he was back in the employ of the Public Service Company at the same wages.

His doctor gives as his opinion that the claimant has a permanent partial loss of the use of his right leg to the extent of 40 per cent. During the performance of his duties prior to the accident, the claimant testified that he used an automobile part of the time. He has an actual deformity of the right leg by a shortening of two and one-half inches; a turning in of the right foot to the extent of twenty-five degrees inwards, due to an improper alignment of the bones

at the time of re-setting the leg, and a bulging outward at point of fracture, and it is not possible to obtain any adjustment or corrective appliance to overcome the existing condition, except a higher heel possibly a thicker sole on his shoe. No claim is made for temporary total incapacity during the time claimant was recovering from the effects of the injury. He had already received from the Government under the provisions of Section 10, Article XVI of the Military and Naval Code, the sum of $494.25 in full for temporary total disability. Claimant received $1.00 per day while on active duty. He admits having received compensation both from the Federal Government and from the State of Illinois for medical services, hospital services, and loss of time while unemployed. He is claiming compensation under the Illinois Compensation Act on a basis of $35.00 per week, the amount that he was receiving in private employment. The Assistant Attorney General recommends that he be awarded a sum not to exceed $1,140.00 as full compensation for permanent disability.

In this case the claimant is asking for the sum of $5,000.00 as damages. This claim for compensation arises under Section 11, Article XVI of the Military and Naval Code of the State of Illinois, which in part provides that in every case where an officer or enlisted man of the National Guard "shall be injured, wounded, or killed while performing his duty in pursuance of orders from the Commander-in-Chief, said officer or enlisted man * * * shall have a claim against the State for financial help or assistance, and the State Court of Claims shall act on and adjust the same as the merits of each case may demand." There can be no question here but what the claimant was in the performance of military duty and acting under proper orders at the time of the accident. He was confined to the hospital for a period of ten months following the accident and all of his hospital and medical expenses totalled $2,249.75. This amount was paid by the State Federal Government. If claimant had received the same injury while in private employment, the Workmen's Compensation Act would have controlled. A member of the National Guard in the performance of his duty, is in fact a State employee.

We, therefore, by analogy use the Compensation Act as the measure of damages in this instance, and under the terms of Section 8 (e) 15 of the Workmen's Compensation Act, the

claimant would be entitled to $15.00 per week for a period of 76 weeks or a total compensation of $1,140.00 for 40 per cent loss in the use of his right leg.

WE THEREFORE, Recommend that an appropriation be made in the sum of $1,140.00 in favor of Lyman Phillips.

(No. 1885—Claim denied.)

ALICE BIXLER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 23, 1933.

JEROME R. FINKLE, for claimant.

OTTO KERNER, Attorney General; CARL I. DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when court has no jurisdiction.* The filing of a claim for compensation under Workmen's Compensation Act within the time provided in the Act is jurisdictional and a condition precedent to the right to maintain a proceeding under the Act.

SAME—*demurrer.* Where a declaration on its face shows that no claim for compensation under Workmen's Compensation Act was made within six months after the accident and that no compensation has been paid, demurrer will be sustained.

Mr. JUSTICE VAUSE delivered the opinion of the court:

This is a claim for the allowance of compensation for an injury received by the claimant while operating an electric power driven food cutting machine containing rotary knives. She was injured on July 6, 1931, while employed as an attendant at the Alton State Hospital, Alton, Illinois, an institution operated by the State of Illinois through its Department of Public Welfare.

The Attorney General has made a motion to dismiss this case because no claim for compensation was made within six (6) months from the date of the alleged accident and injury. The claimant filed a verified declaration in this court on March 4, 1932 in which it is alleged that the accident from which the injury resulted, happened on the 6th day of July, 1931. It is further alleged on page 2 of the declaration as follows:

"Your petitioner further represents to the Court that she has never presented this claim to any State Department, or State Officer of the State of Illinois, or to any person, corporation, or tribunal, of any kind or character,

and that she has not, nor has any person for her received any payment on account of such claim, and there are no other persons who have any interest in said claim.

"Your petitioner further avers that she is damaged in the sum of One Thousand ($1,000.00) Dollars on account of the injury received by her herein set forth, and therefore she brings this suit, etc."

In the case of *City of Rochelle* vs. *Industrial Com.*, 332 Ill. 386 on page 391, it is said:

"Cahill's Stat. 1925, p. 1190; Smith's Stat. 1925, p. 1292; provides that no proceedings for compensation under the Act shall be maintained unless claim for compensation has been made within six months after the accident. The making of a claim for compensation is *jurisdictional* and a *condition precedent* to the right to maintain a proceeding under the Compensation Act."

We are not justified, in deciding cases in this court, in overruling decisions of the Supreme Court on the ground of social justice and equity of any other pretext.

Accordingly the demurrer of the Attorney General is sustained, the claim is denied and the suit is dismissed.

(No. 1941—Claimant awarded $900.00.)

GLENN BOND, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 23, 1933.

VICTOR HEMPHILL, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made.* Where claimant sustains accidental injuries arising out of and in course of employment, while engaged as a State employee in extra hazardous undertaking, an award will be made under provisions of Workmen's Compensation Act.

Mr. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Prior to, and on the 9th day of October, A. D. 1931, the claimant, Glenn Bond, was employed by the State of Illinois in connection with the construction of durable hard-surfaced roads, and on said date, while he was greasing one of the pumps used in connection with such work, the fingers of his right hand became entangled in the gears, and were severely crushed, and in consequence thereof it became necessary to amputate the thumb at the first joint, and the first finger at the second joint. He remained in the hospital for about a week and under the doctor's care until November 29th, 1931, at

which time he was discharged. All physicians' bills and hospital bills were paid by the respondent.

At the time of the accident, his wages were at the rate of Twenty-four Dollars ($24.00) per week, and after the accident he was paid compensation for temporary total disability at the rate of Twelve Dollars ($12.00) per week from the time of the accident to the date of his discharge.

The work in which claimant was engaged was extra-hazardous within the meaning of Paragraph one (1) or Section three (3) of the Compensation Act (*City of Rock Island* vs. *Ind. Com.*, 287 Ill. 76), and he is therefore entitled to compensation under the Act for such loss of use of the thumb and first finger of his right hand, as may be shown by the evidence, provided he has brought himself within the requirements of such Act.

The Attorney General has filed a motion to dismiss the claim for want of jurisdiction on account of the failure of claimant to make claim for compensation within six months after the date of the accident, as required by Section twenty-four (24) of the Compensation Act.

Since the entry of such motion and pursuant to leave of court, the claimant has introduced additional evidence proving conclusively that claim for compensation was, in fact, made within six months from the time of the accident in accordance with the requirements of Section 24 of the Compensation Act. The motion to dismiss is, therefore, overruled and denied.

The Attorney General having submitted the case for hearing on the merits, and the State having failed to plead, a general traverse of the declaration is considered filed under the rules of this court.

Under the facts as hereinbefore set forth, and pursuant to the provisions of Section 8E, Paragraphs one (1), two (2) and six (6), the claimant is entitled to compensation at the rate of Twelve Dollars ($12.00) per week, for thirty-five (35) weeks for the loss of the first phalange of his thumb, and for forty (40) weeks for the loss of the second phalange of the first finger, to-wit: the total sum of Nine Hundred ($900.00) Dollars.

Award is, therefore, made in favor of the claimant for the sum of Nine Hundred ($900.00) Dollars.

(No. 2009—Claimant awarded $1,000.00.)

ALICE CAVENDER, A MINOR, BY CHESTER L. CAVENDER, HER FATHER AND NEXT FRIEND, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 23, 1933.

CHESTER E. KING AND CARL N. WEILEPP, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*State not liable for negligence of employees—exception to rule.* Where the evidence shows that a child of the age of five years, sustained serious and permanent injuries as the result of stepping into hot tar, which had been poured into expansion point on State road, by employees of the State and left unguarded and without any warning signs indicating the presence and danger thereof, the acts of the State employee are considered grossly negligent, reckless and wanton and within the exception to the general rule that the State is not liable for the negligence of its employees and an award may be made.

Mr. JUSTICE VAUSE delivered the opinion of the court:

This is a claim made for damages arising from a personal injury to Alice Cavender, age five years, resulting from burns to her left leg when she accidentally stepped into an expansion joint four inches wide and nine inches deep filled with hot liquid asphalt, which had been deposited and left uncovered and entirely unguarded by the maintenance men of the Division of Highways, Department of Public Works and Buildings of the State of Illinois, while completing construction of a hard surfaced road, on November 9, 1931, on State Bond Issue Route No. 48, which road adjoined the farm home of claimant and her parents. The work was done about 1:30 p. m. of that day and about 3:00 p. m. of the same day, claimant, accompanying her mother, was walking over this road on the way to the house of a neighbor and accidentally stepped into the expansion joint. The ankle of the left leg was burned completely around and burns extended up some distance toward the knee. A portion of the burns were second degree burns. Daily medical treatments were required from the date of the injury to February 11, 1932. Total medical expenses incurred amounted to One Hundred Fifty-eight Dollars ($158.00). The burns have completely healed, leaving scar tissue which is sensitive. This limb is somewhat smaller at the place of the injury due to sloughing away of the tissues.

In the opinion of the only medical witness this condition is a permanent one.

This court has repeatedly held that the State is not liable for injuries resulting from the negligent acts of its employees, agents or servants in the exercise of governmental functions. This court has also recognized an exception to this rule in certain exceptional cases. In order to bring a claim within this exception the injuries must be directly attributed to the grossly negligent, reckless or wanton acts of an agent of the State and the claimant must be free from all contributory negligence in reference to the injury. The undisputed facts as disclosed by the record in the instant case at bar are sufficient to bring the case within the exception.

One of the claims for compensation made is on behalf of Oma Cavender, the mother of the injured child, for care and nursing of her injured daughter subsequent to the injury. In performing that service she was performing her duty as a mother for her child who had met with an unfortunate accident. That feature of the claim is without merit and will be denied.

Another claim is for reimbursement of the father, Chester Cavender, on account of loss of time incurred in taking his daughter to the doctor for medical treatment and for the costs of this transportation. This portion of the claim also is denied.

It is therefore the opinion of this court that the claimant, Alice Cavender, be awarded the sum of One Thousand Dollars ($1,000.00), payment thereof to be made to her legal guardian, duly appointed by the proper court with satisfactory proof of such appointment and qualification.

(Nos. 2017-2018-2083-2040. Consolidated—Claimants awarded $272.50.)

HARRY A. ATWELL, No. 2017. WESTERN NEWSPAPER UNION, No. 2018. WIRTH SALES BOOK COMPANY, No. 2083, TOWN CENTER BUILDING CORP., No. 2040, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 23, 1933.

CLAIMANTS, pro se.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*expenses of Illinois George Washington Bi-Centennial Commission—when award will be made for.* Where Act creating Commission provided that it be allowed actual expenses, an award will be made, where it appears that at time of incurring same, there was sufficient in appropriation to pay same, but before presentment of bills same became exhausted, where amount is unquestioned and Attorney General recommends payment.

Mr. JUSTICE LINSCOTT delivered the opinion of the court:

These claimants all appeared for themselves and we have consolidated the claims, for the reason that they arise as expenses incurred by a temporary body created by an Act of the Fifty-seventh General Assembly, approved June 26, 1931, to be known as the Illinois George Washington Bi-Centennial Commission. The purpose of this commission, consisting of fifteen members appointed by the Governor and serving without pay, was to cooperate with the United States Commission in celebrating the two hundredth anniversary of the birth of George Washington.

The Act creating the commission provides that "Such commission shall receive no compensation for this service but shall be allowed the actual expenses incurred in carrying out the provisions of this Act." The sum of Five Thousand Dollars ($5,000.00) was appropriated for such expense. (L. 1931, p. 41.)

After the declarations were filed, the Attorney General requested an investigation and report concerning each claim and received from William C. Thon, chairman of said commission, substantially the following report:

"Dear Sir: I beg to acknowledge receipt of your letter in reference to the above claims and in reply wish to state that I have carefully investigated our Bi-Centennial Commission records as to the correctness of each item claimed to be due. I find balances remaining due and unpaid as follows:

To Harry A. Atwell, for photographic service.....	$ 17.90
To Western Newspaper Union, for printing of the State program of the Commission.....	57.65
To Wirth Sales Book Co., for typewriter rental.....	18.00
To Town Center Bldg. Corp., for office rental of Commission	178.95

The above items are for goods, services and rental ordered and received by the commission. They were all contracted for by the commission before its appropriation became exhausted; however, the bills covering the above balances were not presented for payment until subsequent to that time

and hence could not be paid. The claims are all fair and reasonable and I trust they may be allowed."

When these services were contracted, there was undoubtedly a sufficient unexpended balance still remaining in the appropriation, but before the bills could be presented, the appropriation had become exhausted. Unquestionably these bills are proper, and the Attorney General recommends that each claimant be awarded the amount of his claim in full settlement.

We, therefore, make an award to Harry A. Atwell, for photographic service, the sum of $17.90.

To Western Newspaper Union, for printing of the State program of the Commission, the sum of $57.65.

To Wirth Sales Book Co., for typewriter rental, the sum of $18.00.

To Town Center Bldg. Corp., for office rental of Commission, the sum of $178.95, and recommend that an appropriation be made for the respective amounts.

Respectfully submitted.

(No. 2019—Claimant awarded $2,077.44.)

CHARLES F. CURTIS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 23, 1933.

PARKER, COX & EAGLETON, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made.* Where it is undisputed that claimant received accidental injuries, arising out of and in course of employment, while engaged in extra hazardous occupation, an award for compensation therefor will be made under provisions of Workmen's Compensation Act.

Mr. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

For more than three years prior to, and on the 22d day of June, A. D. 1932, the claimant, Charles F. Curtis, was in the employ of the Division of Highways, Department of Public Works and Buildings, State of Illinois, as maintenance patrolman, and on the last mentioned date was working on

Section 732, S. B. I. Route No. 33, Jasper County. While in the performance of his duties, and while engaged in making repairs on the concrete roadway with a liquid asphalt preparation called "Colos", a portion thereof splashed into his right eye, causing severe burns which eventually resulted in the total loss of the vision of such eye. All medical attention was furnished by the respondent.

It is admitted by the Attorney General that the work upon which the claimant was engaged at the time of the injury was of such a nature as to bring him within the terms and provisions of the Workmen's Compensation Act of this State, and he is therefore entitled to compensation in accordance with the terms and provisions of such Act.

His salary at the time of the injury was One Hundred Twenty-five Dollars ($125.00) per month, or Twenty-eight Dollars and Eighty-five Cents ($28.85) per week, and he had three children under the age of sixteen years at the time of the accident.

From the evidence it appears that the period of temporary total disability was fourteen (14) weeks, and that claimant sustained the total loss of the sight of his right eye. During the period of disability he received his full salary of Twenty-eight Dollars and Eighty-five cents ($28.85) per week, which sum must be deducted in computing the amount of his award.

Claimant is therefore entitled to compensation at the rate of Eighteen Dollars and Seventy-five Cents ($18.75) per week for the period of one hundred thirty-four (134) weeks, for temporary total disability and for specific loss as hereinbefore set forth, in accordance with the provisions of Paragraphs B and E of Section eight (8) of the Compensation Act, less the salary paid him as hereinbefore set forth; such amount to be commuted to an equivalent lump sum in accordance with the provisions of Section nine (9) of the Compensation Act. As we compute it, the net amount due the claimant after commutation to a lump sum as aforesaid, is Two Thousand Seventy-seven Dollars and Forty-four ($2,577.44).

IT IS THEREFORE ORDERED, That claimant be awarded the sum of Two Thousand Seventy-seven Dollars and Forty-four Cents ($2,077.44).

(No. 2020—Claimant awarded $2,801.66.)

MARY E. KOTTER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 23, 1933.

HELM & HELM, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made.* Where State employee sustains accidental injuries, resulting in his death, arising out of and in course of his employment, while engaged in extra hazardous employment, award will be made for compensation under provisions of Workmen's Compensation Act.

SAME—*dependent under Section 7.* One not in being at the time of injury and death of employee is not a dependent, and additional compensation cannot be allowed for child, born to surviving wife of employee, after his injury resulting in death, under Workmen's Compensation Act.

Mr. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant, Mary E. Kotter, as Administratrix of the Estate of Otto F. Kotter, deceased, filed her claim in this court on the 25th day of November, 1932. On motion of the Attorney General the title was amended so that Mary E. Kotter should appear as claimant for the reason that on payments in the Compensation Act the law contemplates that payment shall be made to the beneficiary and not to an estate and thereby subjecting the award to the debts of the estate, if any.

The claimant alleges that Otto F. Kotter was, during his life time and at the time of his death, an employee of the Division of Highways, Department of Public Works and Buildings of the State of Illinois and was employed as a laborer cutting grass and weeds along the shoulders of a hard-surfaced State Highway known as S. B. I. Route 1 of the State of Illinois. He was using a scythe and working with two other State employees.

It appears that he, with the other employees, had gone to the truck for a drink of water and while returning to his work and while walking along the highway, partly on the cement and partly on the shoulder on the easterly edge of the cement highway, facing southerly, a Ford automobile running at a very high rate of speed and driven by one Charles Miller, twenty-one years old, in a southerly direction, overtook Kot-

ter and struck him with great force, knocking him from twelve to fifteen feet away onto the pavement and running over his body. He died on the same day, the first day of June, 1932.

It appears from the evidence that he had been employed infrequently as a maintenance laborer in District No. 9 by the Division of Highways. At the time of the accident he received $3.60 per day or $21.60 per week. At different times in the past six years he had been employed at various occupations as laborer, watchman and inspector. On some of those jobs he had earned $24.00 per week. None of his employment had been steady. The average weekly wage, as shown by the record, is $3.80 per day or $22.80 per week. There is no evidence before us to show how many days Otto Kotter was actually employed as a laborer annually. He was only on this job about three or four days. We must then, figure on the minimum wage per day for 200 days or a total of $760.00 per annum. On this basis, under Section 7(a) of this Act, claimant would be entitled to $3,040.00 as compensation.

Three and one-half months after the death of Otto Kotter a child was born to his wife. Claim is made for the sum of $3,390.00 under the provisions of Section 7(h-2) of the Compensation Act. The essential condition of the right of any person named in said Section 7 to compensation therein provided is that such person must be actually totally dependent upon the earnings of the deceased employee at the time of the injury. We, therefore, hold that inasmuch as this *post-humus* child was not born at the time of the injury and death of Otto Kotter, additional compensation cannot be allowed for that reason. Inasmuch as a payment must be made on a lump sum basis the sum of $3,040.00 must be commuted in accordance with the statute. We estimate that if the Legislature follows the decisions of this court and makes an appropriation for this claim that such appropriation will be ready for payment on or about August 1, 1933. From the time of the injury until this last mentioned date sixty (60) weeks will have elapsed. No weekly payments have been made and no reduction should be made because of that fact. The balance of the sum will be commuted pursuant to statute and an award of $2,801.66 will be made and an appropriation thereof recommended.

(No. 2032—Claimant awarded $3,750.00.)

MABEL EPPLE, ADMINISTRATRIX OF THE ESTATE OF JOHN A. EPPLE, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 23, 1933.

W. F. HAWTHORN, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made.* Where it is conceded that claimant's intestate sustained accidental injuries, causing his death, arising out of and in course of employment, while engaged in extra hazardous employment an award will be made under provisions of Workmen's Compensation Act.

Mr. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Prior to and on, to-wit, the 17th day of September, A. D. 1932, John A. Epple was employed as a trades helper or carpenter at the Manteno State Hospital, Manteno, Illinois, by the Department of Public Welfare, and on the last mentioned date, while engaged in setting wooden forms for concrete curb gutter on one of the roads in the hospital grounds, was accidentally struck on the head by a blow from a sledge hammer in the hands of one Eugene Griswold, a patient at the institution, who, together with another patient, was assisting in the work in which Epple was then engaged. As the result of such blow, Epple sustained a fracture of the skull, accompanied by a brain hemorrhage which resulted in his death on the same day. There is no question but what the injuries sustained by Epple were accidental, and that they arose out of and in the course of his employment.

Epple had been employed at the State Hospital continuously from January 5th, 1931 until the date of his death, and his compensation was approximately Thirty-six Dollars ($36.00) per week. He left him surviving his widow, Mabel Epple, who was thereafter appointed administratrix of his estate and as such administratrix has filed her claim for compensation under the terms and provisions of the Workmen's Compensation Act of this State, claiming the sum of $3,750.00. There after, on motion of the respondent it was

ordered that Mabel Epple in her individual right be substituted as claimant.

It is admitted by the Attorney General that the work in which Epple was engaged at the time he received the injuries which caused his death, properly comes within the provisions of Paragraph one (1), Section three (3) of the Workmen's Compensation Act, and the widow is, therefore, entitled to compensation under the terms and provisions of such Act.

IT IS THEREFORE ORDERED, That the claimant, Mabel Epple, in her individual right, be awarded the sum of Thirty-seven Hundred Fifty Dollars ($3,750.00).

(No. 2046—Claim denied.)

ELBERT J. CRABTREE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 23, 1933.

A. B. JOHNSON, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*jurisdiction.* The jurisdiction of the Court of Claims in actions for compensation by State employees for accidental injuries is derived from paragraph 6 of section 6 of Act creating Court, and is the same in such actions as Industrial Commission has in other cases and the Court in consideration of such cases must be guided by provisions of Workmen's Compensation Act.

SAME—*making claim for compensation within time required by Act, a condition precedent to jurisdiction.* Making claim for compensation and filing application for compensation within time fixed by Workmen's Compensation Act is a condition precedent, without which, Court is without jurisdiction to proceed with hearing.

SAME—*State as employer—effect of Act on.* All of the provisions of the Workmen's Compensation Act apply with equal force to the State and to other employers named in Act, and to employees of the State and other employees named in Act.

LIMITATIONS—*Section 10 of Court of Claims Act—Section 24 of Workmen's Compensation Act.* Section 10 of Court of Claims Act, providing that every claim against State shall be forever barred unless filed within five years after same first accrues is a general enactment and has no application to claims by State employees for accidental injuries suffered in course of employment and such claims are governed by Section 24 of Workmen's Compensation Act, a special enactment, having only reference to same, and the time within which claims for compensation for accidental injuries sustained by State employees must be filed is governed by provisions of said Section 24 of Workmen's Compensation Act and not by Section 10 of Court of Claims Act.

STATUTES—*adoption of existing or other statute.* The terms and provisions of the Workmen's Compensation Act, as far as same are applicable, are considered the same as though they were incorporated in Court of Claims Act.

SAME—*two statutes dealing with a subject—construction.* Where two statutes deal with a subject, one in general and comprehensive terms and the other minutely or specifically, the two should be read together and the one dealing with the subject definitely will prevail over general statute.

EQUITY AND GOOD CONSCIENCE—*when award on grounds of will be denied.* The provisions of paragraph 4 of Section 6 of Court of Claims Act with reference to equity and good conscience merely defines the jurisdiction of the Court and does not create a new liability against the State nor increase or enlarge any existing liability and limits jurisdiction of Court to claims under which State would be liable in law or equity, if it were suable, and where claimant fails to bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure one.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Prior to and on the 20th day of September, A. D. 1931, the claimant was employed by the State of Illinois as an automobile investigator in connection with the office of the Secretary of State. On the last mentioned date, he was called to Springfield by his superior officer for instructions relative to the duties of his office. While returning to his home on said date, at about eight o'clock p. m. and while traveling in a southerly direction on S. B. I. Route No. 4, at a point about one mile south of the corporate limits of Springfield, the motor vehicle then being operated by the claimant, was sideswiped by a truck and trailer without lights, which were proceeding in the opposite direction. The car which claimant was driving was swung across the road and into the ditch, and he avers that he sustained severe and permanent injuries, to-wit, the total loss of the use of the left arm, and that he has expended substantial sums for hospital and medical attention, and makes claim for compensation under the Workmen's Compensation Act.

The accident in question occurred on September 20th, 1931. The evidence fails to show that any claim for compensation was made within six months after the accident, or that any compensation was paid by the respondent, but does show that the declaration was not filed until more than one year had elapsed after the date of the injury.

The Attorney General has filed a motion to dismiss the claim for want of jurisdiction on the following grounds, to-wit:

1. The failure of the claimant to make claim for compensation within six months after the accident.

2. The failure of the claimant to file a declaration or application for compensation within one year after the date of the injury, as required by the terms and provisions of the Compensation Act.

The jurisdiction of the Court of Claims in cases of this character is derived from Paragraph six (6) of Section six (6) of "An Act to Create the Court of Claims, and to Prescribe its Powers and Duties," which provides that the Court of Claims shall have power:

> "To hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by any employee of the State, such determination to be made in accordance with the rules prescribed in the Act commonly called the 'Workmen's Compensation Act', the Industrial Commission being hereby relieved of any duty relative thereto."

The Attorney General contends that by virtue of such provision this court is vested with the same jurisdiction in claims for compensation of State employees as that possessed by the Industrial Commission in cases properly before it, and that in the consideration of this case, the court must be guided by the provisions of the Workmen's Compensation Act, with particular reference to Section twenty-four (24) of such Act which provides that "no proceedings for compensation under this Act shall be maintained unless claim for compensation has been made within six months after the accident;" also that "unless application for compensation is filed with the Industrial Commission within one year after the date of the injury, or within one year after the date of the last payment of compensation, the right to file such application shall be barred."

The claimant contends that the aforementioned provisions of Section twenty-four (24) of the Compensation Act have no application to this case, and that the only limitation on the right of the claimant to file his declaration or application is the five-year Statute of Limitations, provided by Section ten (10) of the Court of Claims Act, and that the provisions of the Workmen's Compensation Act are to be considered

and applied by this court only in determining the *amount* of compensation to be paid.

It is a well established rule of law that a statute may adopt a part or all of another statute by a specific reference thereto, and the effect thereof is the same as though the statute or part thereof referred to, had been written into the adopting statute.

The case of the *Zurich Accident Insurance Co.* vs. *Industrial Commission,* 331 Ill. 576, was a case arising under the Occupational Diseases Act. Paragraph three (3) of Section Fifteen (15) of such Act, provided, among other things, that "proceedings for compensation hereunder shall be had and maintained in the same manner as is now or may be hereafter provided by the Workmen's Compensation Act with reference to proceedings for compensation for accidental injuries," etc.

It was contended in that case that Section thirteen (13) of the Constitution of this State was violated by reason of the reference to and incorporation of the provisions of the Workmen's Compensation Act in the Occupational Diseases Act without inserting such provisions at length in the Occupational Diseases Act. The court in that case (p. 580) said:

"The effect of that section is to incorporate into the Act all of the provisions of the Workmen's Compensation Act applicable. This is simply the familiar legislative process of adopting certain portions of another statute by reference. It is a method of legislation which is frequently followed and has uniformly been held to be free from constitutional objections. The effect of such reference is as though the statute or the provisions adopted had been incorporated bodily into the adopting statute."

The same rule is recognized and applied in the following cases, to-wit: *Evans* vs. *Illinois Surety Co.,* 298 Ill. 101; *Zeman* vs. *Dolan,* 279 Ill. 295; *People* vs. *Crossley,* 261 Ill. 78.

In the case of *Evans* vs. *Illinois Surety Co., supra,* the Supreme Court, on page 106, quoted with approval the following rule which was laid down in the case of *Zeman* vs. *Dolan, supra,* to-wit:

"Whenever an Act of the Legislature confers powers which are recited in another Act, the Act to which reference is made is to be considered and treated as if it were incorporated into and made a part of the Act which contains the reference."

It follows, therefore, that the terms and provisions of the Workmen's Compensation Act, so far as they may be appli-

cable, must be considered by this court in this case the same as though they were incorporated bodily into the Court of Claims Act.

The contention of the claimant to the effect that the provisions of the Workmen's Compensation Act are to be considered and applied by this court only in determining the *amount* of compensation, is untenable. Paragraph six (6) of Section six (6) of the Court of Claims Act gives this court power "to hear and determine the *liability* of the State for accidental injuries," etc., etc., and further provides that *such determination* shall be made in accordance with the rules prescribed by the Workmen's Compensation Act; and that the Industrial Commission is relieved of any duty thereto.

It seems clear that this court must, in the first instance, consider and determine the question as to whether there is a liability on the part of the State, and that in such consideration and determination, this court must be governed by the provisions of the Workmen's Compensation Act. In short, this court has the same jurisdiction with reference to claims for compensation for accidental injuries or death suffered in the course of employment by any employee of the State as that possessed by the Industrial Commission in claims of other persons whose rights must be determined by the Compensation Act.

Such being the case, the question arises as to the effect of the aforementioned provisions of Section twenty-four (24) of the Compensation Act relative to making claim for compensation within six months, and filing application for compensation within one year after the date of the injury, when considered in connection with Section ten (10) of the Court of Claims Act which provides that every claim against the State cognizable by the Court of Claims shall be forever barred unless filed within five (5) years after the claim first accrues.

In considering a similar proposition, our Supreme Court, in the case of *Robbins* vs. *Lincoln Park Commissioners,* 332 Ill. 571, stated the rule as follows (p. 579):

"The rule is, that where there is to be found in a statute a particular enactment, it is to be held operative as against the general provisions on the subject either in the same Act or in the general laws relating thereto. *Handtoffski* vs. *Chicago Traction Co.,* 274 Ill. 282; *City of Chicago* vs. *M. & M. Hotel Co.,* 248 id. 264; *City of Cairo* vs. *Bross.* 101 id. 475."

In the case of *Handtoffski* vs. *Chicago Traction Co.*, 274 Ill. 282, the Supreme Court (p. 286) said:

"It is a rule in the construction of statutes that 'where there is in the same statute a particular enactment and also a general one, which in its most comprehensive sense would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.' Endlich on Interpretation of Statutes, sec. 399; *Chicago and Northwestern Railway Co.* vs. *City of Chicago*, 118 Ill. 141."

The rule is also stated in 59 *Corpus Juris*, p. 1056, as follows:

"Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, unless it appears that the legislature intended to make the general Act controlling."

Section ten (10) of the Court of Claims Act which provides in substance that *every claim against the State cognizable by the Court of Claims* shall be forever barred unless the claim is filed within five years after the claim first accrues, is a general enactment which has application to all claims against the State. The terms and provisions of Section twenty-four (24) of the Compensation Act constitute a special enactment which has reference only to claims against the State "*for accidental injuries or death suffered in the course of employment by any employee of the State.*" Applying such conclusions to this case, the terms and provisions of the special enactment, that is to say the terms and provisions of Section twenty-four (24) of the Compensation Act, must prevail over the general five year Statute of Limitations prescribed in the Court of Claims Act.

The effect of such holding is to establish a uniform rule with reference to making claim for compensation and filing application for compensation in all cases determined by the Workmen's Compensation Act, whether the claim be against the State or any other employer. To hold otherwise would establish one rule for State employees and an entirely different rule for any other employees; would permit State employees to recover compensation in cases under the Act if they make application within five years after the accident,

even though no prior claim for compensation had ever been made; while other employees would be required to make claim for compensation within six months after the accident and file their applications for compensation within one year after the date of the injury or within one year after the date of the last payment of compensation. We cannot conceive that the Legislature intended to make such an unjust distinction.

Furthermore, Section three (3) of the Compensation Act provides that "The provisions of this Act * * * shall apply * * * to the State, County, City, Town, Township, Incorporated Village, or School District, Body Politic or Municipal Corporation, and to all employers, and all their employees engaged in any department of the following enterprises or businesses," etc., etc.

Section four (4) of such Act provides that the term "employer" shall be construed to be "First—The State, and each County, City, Town, Township, Incorporated Village, School District, Body Politic or Municipal Corporation therein," etc.

Section five (5) of such Act provides that the term employees' shall be construed to mean "First—Every person in the service of the State, County, City, Town, Township, Incorporated Village or School District, Body Politic or Municipal Corporation therein," etc.

It will be noted that in the foregoing provisions the State stands on exactly the same footing as the County, City, Town, Township, Incorporated Village, School District, Body Politic, Municipal Corporation, and all others named in such sections.

So far as we have been able to ascertain, all of the provisions of the Act apply with equal force to the State and to other employers named in the Act; and also apply with equal force to the employees of the State and to other employees named in the Act.

Apparently the framers of the Act intended that the provisions thereof should apply with equal force to the State and to all others coming within the provisions thereof.

As previously stated, the record fails to show that any claim for compensation was made within six months after the accident, or that any compensation was paid by the respondent; but does show that the declaration was not filed until more than one year had elapsed after the date of the injury. It remains to consider the effect of the failure to

comply with the aforementioned requirements of Section twenty-four (24) of the Compensation Act.

In the case of *City of Rochelle* vs. *Ind. Com.* 332 Ill. 386, our Supreme Court held that the making of claim for compensation within the time required by the statute is jurisdictional, and is a condition precedent to the right to maintain a proceeding under the Compensation Act. The same conclusion was reached in the following cases, to-wit: *Inland Rubber Co.* vs. *Ind. Com.*, 309 Ill. 43; *Bushnell* vs. *Ind. Com.*, 276 Ill. 262; *Haiselden* vs. *Ind. Board*, 275 Ill. 114.

In the case of *DuQuoin School District* vs. *Ind. Com.*, 329 Ill. 543 it was held that where application for compensation is not filed within one year after the date of the injury, or within one year after the date of the last payment of compensation, the claim is absolutely barred. The same rule was laid down in the case of *Chicago Board of Underwriters* vs. *Ind. Com.*, 332 Ill. 511.

The making of claim for compensation, and the filing of application for compensation within the time required by the Act being a condition precedent to the right of the claimant to maintain this proceeding this court is without jurisdiction to proceed with the hearing. *Inland Rubber Co.* vs. *Industrial Commission*, 309 Ill. 43.

Although claimant in his declaration avers that "he comes within the provisions of the Workmen's Compensation Act of 1911, as amended, and that his said employment is extra-hazardous within the meaning and intent of Section three (3) of said Act," yet in his brief filed in opposition to the motion of the Attorney General to dismiss the case, he disclaims such averment and states that his claim is filed" under the provisions of the Court of Claims Act, and upon the broad general recognized principal that the State of Illinois will do justice to an injured employee of the State.

This, in effect, is a reliance upon what is sometimes known as the doctrine of equity and social justice, and inasmuch as there are a number of claimants before this court who are invoking that doctrine, and who apparently contend that this court has unlimited jurisdiction and power to make an award against the State in any case where there are any equities in their favor, the court will give due consideration to the question thus raised.

Paragraph twenty-six (26) of Article four (4) of the Constitution of 1870 provides as follows: "The State of Illinois shall never be made defendant in any court of law or equity."

Prior to 1877 there was no tribunal in this State wherein claims against the State could be heard and determined. In 1877, the Legislature created the Commission of Claims, to be composed of one judge of the Supreme Court, and two circuit judges of the State, and in the Act creating such commission, provided that "it shall be the duty of said Commission to hear and determine all unadjusted claims of all persons against the State of Illinois, and said Commission shall hear and determine such claims according to the principles of equity and justice, except as otherwise provided in the laws of this State." The Commission of Claims continued to function without any substantial change in the powers above enumerated until 1903. In that year the Court of Claims was created by the Legislature, and in the Act creating such court, after setting forth specifically the character of claims which the court was authorized to hear and determine, it was provided in Section three (3) of the Act as follows: "And such court shall hear such claims according to its rules and established practice, and determine the same according to the principles of equity and justice, except as otherwise provided in the laws of this State." Such provisions remained in force until 1917 when the present Court of Claims was created.

Paragraph four (4) of Section six (6) of the Act of 1917 as then enacted and as now in force, provides that the Court of Claims shall have power to "hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, *ex contractu* and *ex delicto*, which the State as a sovereign commonwealth, should, in equity and good conscience, discharge and pay."

It will be noted that both the aforementioned Commission of Claims Act of 1877, and the original Court of Claims Act of 1903, provided for the determination of the claims over which the court was given jurisdiction "according to the principles of equity and justice;" while the present Act provides for the hearing and determination of "all claims and demands * * * which the State, as a sovereign commonwealth, should, in equity and good conscience, discharge and pay."

The first case involving the construction of the aforementioned provision of the Act of 1877 was the case of *Schmidt* vs. *State*, 1 Ct. Cl. 76, decided in 1890. In that case, the claimant, who was in the employ of the State as a cell-house keeper at the Southern Illinois Penitentiary at Chester, sought to recover damages for injuries sustained as the result of an assault made upon him by one of the convicts in such penitentiary while the claimant was in discharge of his duty. The Commission rejected the claim on the grounds that the State was not liable and stated that "if it be conceded which the proof leaves in some doubt, that this convict obtained the stick used by him in an attack upon claimant, through the negligence or carelessness of some employee, then the rule of law seems to be firmly settled that the State * * * cannot be held liable for the tort of any of its employees unless such liability is created by the statute * * *. The law creating this Commission does not undertake to create a new liability against the State but provides a method by which the claims against the State may be heard before this Commission." In its opinion the Commission further said:

"The point has been pressed in argument by counsel for claimant that the Legislature would have the right in a case of this kind, in its discretion, to allow a reasonable sum to persons injured, making an appropriation for its payment, although the claim was strictly speaking, neither a legal or equitable claim, and that the intent of the Act creating this Commission was to transfer to the Commission the same discretionary power that the Legislature would have; or, in other words, that the Commission would be justified although believing the claim was neither an equitable nor legal claim against the State, in its discretion to make an award against the State and in favor of the claimant. To this proposition we cannot assent. It is our understanding that in the use of the language 'to determine the same according to the principles of equity and justice' is meant and used with a legal signification and that this Commission has no power to make an award in any case unless the facts show a legal or equitable claim against the State. We do not believe it was the intention of the Legislature to leave it discretionary with the Commission to make an award in favor of the claimant regardless of the question as to whether he had a legal claim against the State.

We are of the opinion, further, that it would be an exceedingly dangerous precedent to hold that the Commission had any such discretion. While it is true and we have endeavored in this case to find some principle upon which we might make an award in favor of this claimant, that his health and usefulness has been practically destroyed, recognizing that it is one of those cases appealing strongly to the sympathy of those who have heard this evidence, or are familiar with the facts of the case and we cannot but believe that if the facts of this case are presented to the Legislature of this State that some

relief will be granted to this unfortunate claimant; but, at the same time we feel compelled to hold that we have no power, under the facts, to make an award in his favor and for that reason we reject the claim."

In the case of *Henke* vs. *State*, 2 Ct. Cl. 11, decided after the creation of the original Court of Claims, in 1903, the law as set forth in the case of *Schmidt* vs. *State*, was approved, and the court there declared that the opinion rendered in the Schmidt case "has been an established principle, closely followed by this court ever since, in the adjudication of similar cases." This court in the Henke case further stated:

"The Act of 1903, creating the Court of Claims, successor to the Commission of Claims, re-enacts the section referred to, and, since the passage of the Act of 1903, this Court has still uniformly held to the doctrine that in the establishment of this tribunal, it was not the intention to create a new class of claims against the State, but to provide a tribunal to determine those claims against the State which civilized governments have always recognized."

In the case of *Jorgenson* vs. *State*, 2 Ct. Cl. 134, this court said:

"In the adjudication of claims filed against the State of Illinios, this Court, from the nature and purposes of its creation, is limited to a consideration of the question, whether, from the facts alleged and proven, any legal liability attaches to the State and no authority or power is vested in this Court to allow any claim presented for consideration unless the facts alleged and proven show the existence of such a legal liability."

* * * * * * * * * *

"In passing upon the demurrer herein interposed, the Court recognizes the meritorious nature of the claim presented, the unfortunate character of the occurrence and the resulting consequences to the claimant, but being limited, as before stated, to a consideration of the issues involved from the standpoint of the legal liability of the State in such cases, this Court is forced to sustain the demurrer."

In the case of *Morrisey* vs. *State*, 2 Ct. Cl. 254, the court, on page 270 said:

"This Court has repeatedly held, that the statute which creates this Court does not increase or enlarge the liability of the State, but provides only the forum, wherein claims may be adjudicated according to the principles of equity and justice, except as otherwise provided by law. * * * This appears to be a harsh rule, but we do not make the law and can only interpret it as we find it, and much as we would like to find a judgment for the claimant in this case, considering the facts as they are we must reject this claim."

In the case of *Ryan* vs. *State*, 4 Ct. Cl. 57, which arose under the present Act, this court said:

"Counsel for claimant contends that the Act of 1917, creating the Court of Claims, has practically repealed the rule that the doctrine of respondent superior does not apply to the State, and that this Court should hear and allow claims of this kind on the ground that they should appeal to the good conscience and equity of the Court. This Court has held in other cases presented at this term of Court, that said Act does not authorize this Court to allow any claims which are not based on principles of law and equity, however much such cases might appeal to the sympathies of the Court * * * The claim is therefore rejected."

We are cognizant of the fact that some time after the decision of the court in the Ryan case, *supra*, in a number of decisions which apparently held a strong appeal to the sympathy of the court, it departed from the strict rule laid down in the cases hereinbefore referred to, and thereafter allowed certain claims on which there was no legal liability against the State, on grounds which were characterized, first, as social justice, then as social justice and equity, and afterwards as equity and good conscience.

This continued for some time, and thereafter the court evidently becoming aware of the dangerous tendency of its decisions and the extent to which they were being carried, and apparently recognizing that there was no legal warrant or authority therefor, began gradually to get back to the original holdings of the court to the effect that this court has no authority or power to allow any claim presented for consideration, unless the same is based upon a legal or equitable right.

In the case of *Mercer* vs. *State*, 6 Ct. Cl. 20, this court, on page 21, said:

"But it is urged that the claim should be allowed as a matter of equity. There is nothing in the record of this case to call for equitable relief. The State, being sovereign, cannot be sued, either at law or in equity, without its consent. In order that there might be a forum in which claims and demands against the State could be adjudicated in accordance with the well known principles of law and equity the Legislature created the Court of Claims, and gave it jurisdiction to hear and decide all claims and demands against the State, both legal and equitable. It was not the intention of the Legislature in creating this Court to give it unlimited power or jurisdiction to make awards to claimants, and it has no power to make an award unless the evidence shows the claimant has a just demand based on either legal or equitable principles."

In the case of *Peterson* vs. *State*, 6 Ct. Cl. 77, the claimants recognized that their claims were not founded upon a legal

basis, and asked for an award on account of equity and good conscience. In that case the court cited with approval the aforementioned case of *Schmidt* vs. *State, supra,* also *Jorgensen* vs. *State, supra,* and *Murdock Grate Co.* vs. *Commonwealth, infra,* and further said:

"It is plain from the language of this statute (The Court of Claims Act) that no claim against the State can be allowed by this Court unless there is either a legal or equitable obligation of the State to pay it. Before a claimant can have an award against the State, he must show that he comes within the provisions of some law making the State liable to him for the amount claimed. If he cannot point out any law giving him the right to an award, he cannot invoke the principle of equity to secure the award. Where there is no legal liability, equity cannot create one. (10 R. C. L. sec. 132.) Equity is not the court's sense of moral right; it is not the power of the court to decide a case according to the high standard of abstract right, regardless of the law. * * * To give this statute the construction contended for by claimant would result in giving this court the power to hold the State liable for the misfeasance and malfeasance of all its officers, the torts of all its servants and agents, and all damages caused by the wrongful exercise of their powers by such officers and agents. We do not believe the Legislature intended any such radical and far-reaching change in the law when it enacted the statute creating this Court."

In the case of *Perry* vs. *State,* 6 Ct. Cl. 81, this court on page 84, said:

"Claimant urges, however, that he should be awarded compensation as an act of justice and equity regardless of the principles of law involved. The jurisdiction of this Court is fixed by law and it has no powers except those given by the Act creating it. Section Six (6) of that Act provides: 'The Court of Claims shall have power to hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, *ex contractu* and *ex delicto*, which the State, as a sovereign commonwealth, should in equity and good conscience discharge and pay'. It is obvious from the language of this statute that no claim against the State can be allowed by this Court unless there is either a legal or equitable obligation of the State to pay it. If there is either a legal or equitable obligation resting upon the State to pay a claim, then justice requires that the State should pay it. * * *

"Claimant's idea seems to be that equity is used in this statute as nothing more nor less than the power of the court to decide each case according to a high standard of morality and abstract right, regardless of the law. Such a construction would leave this Court with practically no limitation upon its power to render judgments against the State. * * * When the Legislature created this Court and clothed it with power to hear claims against the State we do not think it thereby intended to waive the right of the State to interpose any legal or equitable defense it might have to the demands of claimants. * * *

"Claimant's demand, not being based upon any legal or equitable right, cannot be allowed, however strongly it may appeal to the sympathy of the Court. The Court can only enforce the law as it is, it has no power to change it. The claim will therefore be denied and the cause dismissed."

The case of *Watkins* vs. *State*, 6 Ct. Cl. 172, was another case in which the doctrine of equity and good conscience was fully considered, and the early decisions of this court in *Schmidt* vs. *State*, 1 Ct. Cl. 76, and *Jorgensen* vs. *State*, 2 Ct. Cl. 134, were adhered to and the right to allow a claim solely on the grounds of equity and good conscience was denied. In that case the court said (p. 174):

"Before a claimant can have an award against the State he must show he comes within the provisions of some law making the State liable to him for the amount claimed. If he cannot point to any law giving him the right to an award, he cannot invoke the principle of equity to secure the award. Where there is no legal liability, equity cannot create one."

Numerous other decisions of this court since the Watkins case have adhered to the principles there announced. The same conclusion has been reached by the courts in other jurisdictions.

In the case of *Murdock Grate Co.* vs. *Commonwealth*, (Mass.) 24 N. E. 854, the court, in passing upon a similar statute in that State, said:

"The Act we are discussing discloses no intention to create against the State a new and heretofore unrecognized class of liabilities, but only an intention to provide a judicial tribunal where well recognized existing liabilities can be adjudicated."

In the case of *City of Leadville* vs. *Leadville Power Co.*, (Colo.) 107 Pac. 801, the court, on page 813, used the following language:

"'Equity and good conscience' is an elastic phrase often applied in adjudicating the rights of parties, but it is not a doctrine or rule under which a party will be deprived of his property without due process."

Certainly such rule should apply with equal force to the taxpayers of a State, from whom the revenue to pay all claims must come.

In the case of *Slaughter* vs. *Martin*, (Ala.) 63 So. 689, the term "equity and justice" was held to mean, according to the forms, rules and principles of law as established by the Legislature and declared by the courts.

In the case of *Thornton* vs. *Lane*, 11 Ga. 459, it was held that the word "equity" as used in the oath administered to a special jury, by which they were sworn to give a true verdict, according to the "equity" on the opinion they entertained of the evidence produced to the best of their knowledge, is a convertible term with "law" and means not that the verdict should be given according to some vague, undefinable opinion which the jury might entertain of equity, but according to a system of jurisprudence governed by established rules and bounded by a fixed precedent, from which the jury were not permitted to depart, however liable to objections these rules and precedents might be, in their judgment.

In the case of *Steger* vs. *Traveling Men's Business Association*, 208 Ill. 236, the court, on page 244, used the following language:

"It must be remembered that while equity is based upon moral right and natural justice, it is not co-extensive with them. Equities are rights which are established and enforced in accordance with the principles of equity jurisprudence under some general principle or acknowledged rule governing courts of equity."

Counsel for claimant in his brief makes reference to the Fergus case (*Fergus* vs. *Russel*, 277 Ill. 20), but there is nothing in the decision of the court in that case which authorizes this court to allow an award to the claimant in this case. We are cognizant of the fact that the aforementioned grant of authority by the Legislature to the Court of Claims does not deprive the Legislature itself of the power to pay claims against the State. As said by the Supreme Court in the Fergus case:

"The Court of Claims is a statutory body not provided for in the Constitution, and its action can have no effect upon the power of the Legislature to pay claims against the State."

Regardless, however, of the power of the Legislature to pay claims on its own initiative, this court in passing on claims can exercise only such authority and power as have been delegated to it under the terms and provisions of the Court of Claims Act as hereinbefore set forth and construed.

We conclude, therefore, that Section four (4) of Paragraph six (6) of the Court of Claims Act, which provides as follows, to-wit: The Court of Claims shall have power: "to hear and determine all claims and demands, legal and equit-

able, liquidated and unliquidated, *ex contracto* and *ex delicto*, which the State as a sovereign commonwealth, should, in equity and good conscience, discharge and pay"; merely defined the jurisdiction of the court, and does not create a new liability against the State, nor increase or enlarge any existinging liability; that the jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State either at law or in equity, if the State were suable; that this court has no authority to allow any claim unless there is a legal or equitable obligation on the part of the State to pay the same, however much the claim might appeal to the sympathies of the court; that unless the claimant can bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure such an award.

The claimant having failed to bring himself within the provisions of the law entitling him to an award, there is nothing this court can do but deny the claim.

IT IS THEREFORE ORDERED, That the motion of the Attorney General to dismiss the case be sustained, and the claim is hereby dismissed.

(No. 2068—Claimants awarded $114.90.)

ST. MARGARET'S HOSPITAL OF SPRING VALLEY, ILLINOIS, AND DR. CHARLES J. GREEN, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 23, 1933.

PAUL D. PERONA, for claimants.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

MEDICAL SERVICES—*hospital bill.* Where a State employee is injured in line of duty, and requires immediate medical treatment and hospital care, and same is given him by claimants, upon express representation of superintendent of department in which injured was employed that State would assume all obligation therefor, an award may be made, where amount is reasonable, upon recommendation of State department and Attorney General.

Mr. JUSTICE VAUSE delivered the opinion of the court:

This is a claim by St. Margaret's Hospital of Spring Valley, Illinois, and Dr. Charles J. Green of Ladd, Illinois

for allowance of a hospital bill of Sixty-five Dollars and Ninety Cents ($65.90) in behalf of the hospital above named and for medical services in the amount of Forty-nine Dollars ($49.00) in behalf of Dr. Green on account of hospital and medical treatment of one Percy L. Fink, an employee of the Division of Highways, Department of Public Works and Buildings, who was injured on June 8th, 1931, when burned in an explosion resulting from the ignition of gasoline which was being withdrawn by Fink from a State owned paving mixer.

Stipulation of facts has been entered into between the claimants through their attorney and the Attorney General's office as the representative of the State of Illinois and from this stipulation it appears that P. L. or Percy Fink, State employee was injured on June 8th, 1931, and was on that date treated for these injuries by Dr. Charles J. Green, one of the claimants; that the injured man was taken to St. Margaret's Hospital at Spring Valley, Illinois on the evening of the day of the injury and remained there until June 30, 1931; that on the day after the man was taken to the hospital, the Mother Superior requested information of C. M. Wahl, Superintendent of Construction of the State of Illinois, as to who would be responsible for the hospital services to be rendered to this man. On June 11, 1931, Mr. Wahl, in his capacity as Superintendent of Construction, on the letterhead of the State of Illinois, Department of Public Works and Buildings, notified the Mother Superior that the State of Illinois would assume all obligations in connection with the case; that on or about this same time Mr. Wahl also assured Dr. Green that the services of Dr. Green, rendered to Fink, would be paid by the State of Illinois; that on August 7, 1931, Mr. Wahl requested statements from the hospital and from Dr. Green and on August 10, the respective statements for services were sent to the Highway Department of the State of Illinois; that said statements were approved for payment on October 1st, 1931; that the regular appropriation for medical expense for the State Highway Department lapsed on September 30, 1931, into the General Fund; that the respective services both for hospital and medical services were rendered prior to July 1st, 1931; that the hospital services rendered by St. Margaret's Hospital and unpaid are in the amount of

Sixty-five Dollars and Ninety Cents ($65.90), and the medical services rendered by Dr. Charles J. Green and unpaid are in the amount of Forty-nine Dollars ($49.00); that said bills have been approved as to reasonableness of services and correctness by the State Highway Department; that the Chief Highway Engineer, in his report of May 3rd, 1933, recommends to the court that said bills be allowed and the Attorney General, in his statement, also recommends that said claims be allowed.

Under the undisputed circumstances shown by the stipulation filed in this case, the court is of the opinion that said claims should be allowed and accordingly the claimant, St. Margaret's Hospital of Spring Valley, Illinois is awarded the sum of Sixty-five Dollars and Ninety Cents ($65.90) and Dr. Charles J. Green of Ladd, Illinois, is awarded the sum of Forty-nine Dollars ($49.00).

(No. 2091—Claimant awarded $297.03.)

SHELL PETROLEUM CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 23, 1933.

THOMPSON, MITCHELL, THOMPSON & YOUNG, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

SUPPLIES—*when award will be made for.* Where facts are undisputed that State received supplies as ordered by it, and that bill therefor was not presented for payment before lapse of appropriation out of which it could be paid, an award for amount due will be made.

Mr. JUSTICE VAUSE delivered the opinion of the court:

This is a claim by Shell Petroleum Corporation against the State of Illinois for merchandise furnished to the State on the order of the Division of Highways, Department of Public Works and Buildings, over a period of three months, from April 1, 1931 to June 30, 1931.

The case has been submitted upon stipulation of facts between the State and the claimant and from this stipulation it appears that claimant furnished Two Hundred Ninety-seven Dollars and Three Cents ($297.03) worth of merchandise

specified in claimant's bill of particulars upon the dates and in the amounts and to the persons mentioned, that the prices therefor were the reasonable value of the items furnished at the time of the sale, that the persons so purchasing were authorized by the State of Illinois to purchase said items and to agree for the payment of the same at the respective prices named.

Claimant presented its claim for these items to the Division of Highways and payment was refused by reason of the expiration of the appropriation out of which payment for these items could be made. It is further stipulated that claimant has not received any payment on account of said claim.

Under these admitted circumstances claimant is entitled to an allowance of its claim, and an award is accordingly made in favor of the claimant for the sum of Two Hundred Ninety-seven Dollars and Three Cents ($297.03).

(No. 2157—Claimant awarded $3,380.62.)

JOHN MASON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 23, 1933.

FRANK R. EAGLETON, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made for injury sustained by a State employee.* Where it is undisputed that claimant, a State highway maintenance policeman, sustained accidental personal injuries, arising out of and in course of his employment and that such occupation is extra hazardous, an award will be made for compensation for such injuries and the amount determined under the Workmen's Compensation Act.

Mr. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

For more than one year prior to Septemer 16th, 1932, the claimant, John Mason, was employed as a State highway maintenance policeman by the Division of Highways, Department of Public Works and Buildings. On the last mentioned date, while in the course of his employment and in the performance of his duties, and while driving his automobile on S. B. I. Route No. 4, near Braidwood, Illinois, he sustained serious and permanent injuries as the result of a collision with another automobile which pulled out in front of him as he

attempted to pass around it. The claimant was thrown about forty (40) feet from his car and sustained fractures of his right wrist, right shoulder, left wrist, and thumb; also injuries to his right knee, and multiple rib fractures. He was confined to the hospital for eleven (11) weeks and is permanently disabled as the result of the injuries sustained. All hospital and medical attention was furnished by the respondent.

It is admitted by the Attorney General that claimant, at the time of the accident in question was engaged in an extra-hazardous employment, within the meaning of such words as used in the Compensation Act, and he is therefore entitled to compensation in accordance with the terms and provisions of such Act. His salary was One Hundred Seventy-five Dollars ($175.00) per month, and he had no children under the age of sixteen (16) years at the time of the accident.

From the evidence and stipulation on file it appears that the period of temporary total disability was twenty-one (21) weeks, and that the claimant sustained the following specific injuries, to-wit: Seventy-five per cent (75%) loss of the use of the right arm; fifty per cent (50%) loss of the use of the left hand, and ten per cent (10%) loss of the use of the right leg.

Claimant received his regular salary from the time of the accident until January 31st, 1933, to-wit, the sum of Seven Hundred Eighty-seven Dollars and Fifty Cents ($787.50), which sum must be deducted in computing the amount of his award.

Claimant is therefore entitled to compensation at the rate of Fifteen Dollars ($15.00) per week for the period of 293.75 weeks, for temporary total disability, and for specific loss as hereinbefore set forth, in accordance with the provisions of Paragraphs B and E of Section eight (8) of the Compensation Act, less the salary paid him as hereinbefore set forth; such amount to be commuted to an equivalent lump sum in accordance with the provisions of Section Nine (9) of the Compensation Act. As we compute it, the net amount due the claimant after commutation to a lump sum as aforesaid, is Thirty-three Hundred Eighty Dollars and Sixty-two Cents ($3,380.82).

IT IS THEREFORE ORDERED, That the claimant be allowed the sum of Thirty-three Hundred Eighty Dollars and Sixty-two Cents ($3,380.62).

(No. 1715—Claimant awarded $374.79.)

SPRAGUE DAIRY COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1933.

DONOVAN, BRAY & GRAY, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*negligence of agent of State.* As a general rule no award will be made for damages caused by negligence of an agent of the State, the doctrine of *respondeat superior* not being applicable to the State.

SAME—*exception—when award may be made.* Where, however, the damages sustained are shown by the evidence to be directly attributable to grossly reckless, wanton or wilful acts of an agent of the State, an exception is recognized to the general rule and an award may be made.

Mr. JUSTICE VAUSE delivered the opinion of the court:

This is a claim for damages to and for loss of use of a Chevrolet truck owned by the claimant, resulting from a collision with a passenger automobile, the property of the State of Illinois.

The collision occurred about 6:30 a. m. on December 24, 1930, on Sixteenth Street in Lockport, Illinois, about one hundred (100) feet east of a viaduct over the Santa Fe Railroad tracks and west of a viaduct over the I. & M. Canal. This road is surfaced with gravel at this place. The evidence discloses that coming west on this street after crossing the canal the grade is descending for about 200 feet and the road at the bottom of the incline is somewhat narrow. From this point westwardly to the Santa Fe viaduct, some three hundred feet distant, the road ascends on about a seven per cent (7%) grade. There is a curve in the road on both sides of the viaduct. Claimant's truck was proceeding uphill in a westerly direction on this street, at not over ten miles per hour. At the time the collision occurred and afterward, the truck was about one hundred feet east of the Santa Fe viaduct, was headed west and was entirely on the north or right hand side of the roadway for west bound traffic.

The passenger car which came into collision with the truck at this point was a Chrysler Sedan, owned by the State of Illinois, being driven in an easterly direction on this same

street by Nick Myers, an inmate of the "Old Penitentiary." Myers was assigned to duty as a chauffeur and had driven from the "Old Penitentiary" on the east side of the Des Plaines River over to the State Farm southeast of Stateville Penitentiary on the west side of the Des Plaines River to get Deputy Warden George Erickson for the purpose of conveying him back to the "Old Penitentiary" where the duties of the deputy warden were performed. The deputy did not, however, go back with Myers, but instructed him to return the car to the "Old Penitentiary" and further ordered him to take Erickson's daughter as a passenger and let her off at the depot at Lockport, which was directly on the route back to his ordered destination. A part of Myers' duty was to call for the deputy warden each morning and he traveled this same road most of the time because this route was shorter. The collision resulting in this claim occurred before the sedan had reached the depot where Miss Erickson was to be let out.

After the accident, the State car was on its left hand side of the road. The further testimony is that as one leaves the Santa Fe viaduct going east, the north side of the road is the most traveled, there being rough spots in the south side of the road at that point. There was some snow upon the roadway and the undisputed testimony is that the State car ran more than thirty-three feet after the brakes had been applied before the collision occurred.

One disinterested witness testified to a portion of the occurrences shortly before the accident. This witness was proceeding in the same direction as the State car. The State car passed the witness shortly before reaching the Santa Fe viaduct traveling, in the opinion of the witness, between fifty and sixty miles an hour. The president of the claimant visited the scene of the accident before the cars had been moved. He testified he was able to trace the tracks of the State car from the point where it had left the Santa Fe viaduct to the point of the collision and these tracks were north of the center of the road and at no point from the leaving of the viaduct to the point of the collision were there any tracks of the State car on the south side of the road; that for a distance of about thirty-three feet the tracks showed dark oily markings on the snow.

Under the evidence in this case it seems clear that the convict-driver of the State car, at the time the accident occurred was performing labor of a character which was authorized by statute (Par. 44, Chapter 108, Smith-Hurd Stat., 1931) and which had been assigned to him by his custodian.

The general rule is well established that the doctrine of *respondiat superior* does not apply to the State in the exercise of its governmental functions.

This court has, however, recognized exceptions to the general rule of non-liability above referred to, where the injuries complained of are directly attributable to grossly reckless, wanton or wilful acts on the part of a servant of the State and the claimant is free from all contributory negligence in connection with the injury. The driver of the State car in the present case was not a servant of the State in the ordinarily accepted meaning of that term, but he was being used as an instrumentality of the State and he had the power of voluntary action. We are of the opinion that the peculiar facts of this case bring it within this exception.

The driver of the State car was proceeding down a seven per cent (7%) grade on a road with which he was thoroughly familiar, at 6:30 o'clock, on a hazy morning in December, at a speed of not less than forty miles per hour at a place in the road where his view before he came over the viaduct was obscured (contrary to the provisions of Par. 223, Chapter 121, Smith-Hurd Stat., 1931) and when he did come over the viaduct the undisputed testimony is that he traveled upon his left hand side of the road for over one hundred feet (contrary to the provisions of Par. 159, Chap. 121, Smith-Hurd Stat., 1931) and collided with the claimant's truck which had almost stopped on its right hand side of the road.

The undisputed evidence is that the amount of Two Hundred Seventy-four Dollars and Seventy-nine Cents ($274.79) was reasonably necessary to repair claimant's truck as a result of the collision. We believe a fair damage for loss of use of the truck, under the record, would be One Hundred Dollars ($100.00).

We therefore award the claimant the sum of Three Hundred Seventy-four Dollars and Seventy-nine Cents ($374.79).

(No. 1734—Claimant awarded $3,750.00.)

SAMUEL BRIDGES, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1933.

BENJAMIN G. POLLARD, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*when an award will be made for the death of a member of the Illinois National Guard.* An award will be made for the death of a member of the Illinois National Guard, resulting from injuries sustained while on active duty under authority of Section 11 of Article 16 of the Military and Naval Code of this State.

Mr. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

The claimant, Samuel Bridges, seeks to recover damages on account of the death of his son, Charles Bridges, who, in his lifetime, was a private in Company H, Eighth Infantry Regiment of the Illinois National Guard. It is claimed that said Charles sustained injuries in the line of his duty, which said injuries thereafter caused his death.

From the record it appears that Private Charles Bridges attended the summer encampment with his Company at Camp Grant during the summer of 1927. On the last day of the encampment, to-wit, August 13, 1927, he, with other members of the baggage detail of the Company, was engaged in conveying the baggage on trucks to the baggage car at the railroad station. While riding on top of a truck loaded with such baggage, he was swept off by a low-hanging electric wire and and thrown to the pavement, sustaining a fracture of both forearms, a cut over the left eye with concussion about the head, probably causing a facture of the skull.

The respondent immediately furnished the necessary medical and hospital attention. Bridges was first taken to St. Anthony's Hospital at Rockford, where he remained for two days. He was then transferred to the Chicago Hospital in Chicago on August 15, 1927, where he remained under treatment until September 11, 1927. On the last mentioned date he left the hospital of his own accord and without authority, and was considered by the military authorities as

absent without leave. He returned to his home in Chicago and remained there most of the time until October 1, 1927. While at home he was continually troubled with headaches and with a discharge through the nostrils, and seemed to be unbalanced mentally. On or about September 20, 1927, he was arrested by one of his superior officers for non-attendance at drill and was placed in jail, and remained there for three days. He was released on Friday evening, September 30, and the next morning was raving. He was sent to Cook County Hospital and died two days later, to-wit, September 30, 1927, of epidemic cerebro spinal meningitis.

Two Military Boards of Inquiry investigated the matter. The first Board of Inquiry was convened on August 24, 1927, and found that the accident in which Private Bridges received the aforementioned injuries occurred in the line of his duty. The second Board of Inquiry was convened on October 3, 1933, and found that the death of Private Bridges was caused from spinal meningitis secondary to the head injury sustained at Camp Grant, Illinois, on August 13, 1927. The last mentioned Board also found that the family of the deceased was destitute and unable to defray the burial expenses, and recommended that the State show just consideration.

It appears from the evidence that said decedent left him surviving the claimant, Samuel Bridges, his father, and Nettie Bridges, his mother, dependent upon him for support.

Section eleven (11), Article sixteen (16) of the Military and Naval Code provides as follows:

"In every case where an officer or enlisted man of the National Guard or Naval Reserve shall be injured, wounded or killed while performing his duty as an officer or enlisted man in pursuance of orders from the Commander-in-Chief, said officer or enlisted man, or his heirs or dependents, shall have a claim against the State for financial help or assistance, and the State Court of Claims shall act on and adjust the same as the merits of each case may demand."

Upon the record in this case it appears that the sum of Thirty-seven Hundred Fifty Dollars ($3,750.00) is a fair amount to be paid to the dependents of said soldier.

IT IS THEREFORE ORDERED, That an award be entered in favor of the claimant for the sum of Thirty-seven Hundred Fifty Dollars ($3,750.00).

(Nos. 1767-1768-1769-1770, Consolidated—Claimants awarded $1,369.00.)

Opinion filed March 6, 1933.
Rehearing granted May 2, 1933.
Opinion on rehearing filed June 1, 1933.

MARTHA CONNOLE, ADMINISTRATRIX OF THE ESTATE OF HUGH HANKINS, Deceased, No. 1767, ONIE HANKINS, No. 1768, CARL HANKINS, No. 1769, PEARL CUFF, No. 1770, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

G. C. BORDERS AND T. A. GASAWAY, for claimants.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*property damage—negligence of agent of State.* The State is not liable for the negligence of its agents or employees, the doctrine of *respondeat superior* not being applicable to the State.

SAME—*when award may be made.* Where, however, the evidence shows that the injuries complained of are due to the wilful, wanton or grossly careless acts of an agent or employee of the State, an exception to the rule of non-liability of the State on account of the negligence of its agents will be recognized and an award may be made.

Mr. JUSTICE THOMAS delivered the opinion of the court:

These claims are all based on the same facts, and have been consolidated for hearing. On December 26, 1930, Sam Sonnenberg, an employee of the Division of Highways, was driving a State truck on Route 11 near Collinsville. As he was going up a hill just out of Collinsville the truck stalled. It was about 9:15 o'clock p. m., cloudy and misty but not yet dark. There was no starter on the truck and he got out to crank it. While he was cranking it Carl Hankins, one of the claimants, ran into it from the rear. Hankins was driving a Ford Tudor Sedan. In the automobile with him were his wife, Onie Hankins, their 14 months old baby, Hugh Hankins, Mrs. Pearl Cuff and two of his other children. Mrs. Hankins was sitting in the front seat holding the baby on her lap and Mrs. Cuff and the other two children were in the rear seat. The truck was near the curb on the right hand side of the pavement and had no lights on it. The lights on the Hankins car were burning. As a result of the collision the baby was killed, Mr. and Mrs. Hankins and Mrs. Cuff were injured and the automobile was wrecked. Mr. Hankins is asking $3,000.00

damages, Mrs. Hankins $10,000.00, Mrs. Cuff $5,000.00 and the administrix of Hugh Hankins $5,000.00.

Claimants base their claim to awards on the theory that the State is liable for damages caused by the negligence of its employees and agents. In this claimants are in error. While individuals and private corporations are liable for damages caused by the negligence of their employees and agents the rule does not apply to the State nor to sub-divisions of the State created for governmental purposes. The State is never responsible for the negligence, misfeasance, malfeasance, or omissions of duty of its officers, agents or employees. It does not undertake to guarantee to any one that its employees will be faithful, competent or careful in the performance of their duties, as that would involve it in endless difficulties and losses which would be subversive to the public interests. (*Gibbons* vs. *U. S.* 8 *Wallace*, 269; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; *Davenport Fish Co.* vs. *State*, 5 Ct. Cl. 209; *Story on Agency*, sec. 319.) After quoting Judge Story on the foregoing rule in *Gibbons* vs. *U. S.*, *supra*, Mr. Justice Miller said: "The general principle which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties." In *Minear* vs. *State Board of Agriculture*, *supra*, our own Supreme Court said: "If, as we hold, the State Board of Agriculture is an agency of the State in the exercise of governmental functions, it is not liable, under the common law, for injuries claimed to have been sustained as a result of its negligence. This is not disputed by appellee, and is so thoroughly settled by all the authorities that we deem it necessary to cite only *Hellenbeck* vs. *County of Winnebago*, 95 Ill. 148, and *Maia* vs. *Eastern Hospital*, 97 Va. 507; 47 L. R. A. 577. The opinions in these two cases contain a list of many authorities on the subject." It is clear that claimants have no legal right to an award against the State for the injuries they sustained.

It does not follow, however, that claimants are without a remedy. If as they allege, their injuries were caused by the negligence of Sonnenberg while they were in the exercise of due care (and upon those questions we express no opinion)

they can bring proper actions against him in a court of general jurisdiction and have their damages determined. (*Grootens* vs. *State*, 6 Ct. Cl. 399; *Braun* vs. *State*, 6 Ct. Cl. 104; *Cooney* vs. *Town of Hartford*, 95 Ill. 516.)

The claims are denied and the cases dismissed.

On rehearing granted, Mr. JUSTICE LINSCOTT delivered the opinion of the court:

These claims arising in the same automobile accident have by respective counsel of the parties hereto been consolidated.

Martha Connole, as such administratrix of the estate of Hugh Hankins, a deceased infant, filed a claim asking for damages from the State of Illinois in the sum of Five Thousand Dollars ($5,000.00) on account of the death of claimant's intestate.

Onie Hankins filed a claim asking for damages in the sum of Ten Thousand Dollars ($10,000.00).

Carl Hankins, claimant, filed a claim asking for the sum of Three Thousand Dollars ($3,000.00) for personal injuries and property damage, and Pearl Cuff filed her claim for the sum of Five Thousand Dollars ($5,000.00) for alleged personal injuries.

The facts were: a three-ton Liberty truck belonging to the State of Illinois and under the direction of the Division of Highways had been stalled on Bluff Hill, S. B. I. Route 11, near the western edge of the city limits of Collinsville, Illinois, sometime between 5:15 and 5:45 on the evening of December 26, 1930. At the time this truck became stalled, it was going around a slight curve about half way up the hill. Motor trouble was the cause of the truck stopping. That afternoon and day this truck had been used in maintenance road work and was customarily stored overnight in a garage at the top of the hill. At the time of the accident, the truck was not equipped with lights or a storage battery. The driver of the truck, Sam Sonnenberg, was immediately before the crash, trying to crank it when a Model-A 1930 Ford Sedan driven by one of the claimants, Carl Hankins, crashed into the rear of the stalled truck.

Riding in the front seat with him was his wife, Onie Hankins, who was holding their fourteen months old infant son, Hugh, in her arms. The claimant, Pearl Cuff, was riding in the back seat with two children.

The overwhelming evidence is that it was quite dark and foggy and most of the automobile traffic was using lights. The lights of the car in which all of the claimants were riding were burning, and so far as the evidence shows, were in good condition.

It appears from the evidence that the driver, Carl Hankins, did not see the truck until he was within four or five feet of it, just before the crash. Official sunset on this day occurred at 4:45 p. m., as shown by the records of the United States Weather Bureau of East St. Louis, Illinois.

The infant, Hugh Hankins, was killed almost instantly, and Mr. and Mrs. Hankins, as well as Pearl Cuff, suffered minor personal injuries as the result of the collision. The Ford was badly damaged and subsequently sold to an automobile dealer for $75.00, who repaired the car at a cost of $210.00.

The injured were attended and treated by Dr. H. W. Harrison of Collinsville, Illinois. Pearl Cuff and Onie Hankins remained at the Harrison Hospital for about one week's time and the treatment of the injuries extended over a period of approximately three weeks. In the opinion of the doctor no permanent disability has resulted from these injuries. The cost of medical treatment was as follows:

Pearl Cuff, hospital and medical attention	$66.00
Onie Hankins, hospital and medical attention	71.00
Carl Hankins, medical attention	22.00

Declarations were filed herein on May 5, 1931. It was admitted that no warning lights were placed by the driver of the truck and no effort was made to warn approaching drivers of the situation of the truck. A number of witnesses were heard on both sides.

It is a well established rule that the doctrine of *respondeat superior* does not apply to a State in the exercise of purely governmental functions. This rule is perhaps best stated as follows:

"The government itself is not responsible for the misfeasance, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations in endless embarrassments and

difficulties, and losses, which would be subversive to the public interests; and, indeed, laches are never imputable to the government. *Seymour* vs. *Van Slyck*, 8 Wend. 403; *United States* vs. *Kirkpatrick*, 9 Wheat. 720, 723."

We are, however, of the opinion that the facts in these cases amount to be a wilful and wanton negligence and an exception should be made to the rule as above announced. We fix the damages to the automobile at $210.00; the cost of medical care and attention to Carl Hankins as $22.00 and make an award to him in the aggregate sum of $232.00; and award to Onie Hankins for her hospital and medical attention the sum of $71.00 and to Pearl Cuff, for hospital and medical attention the sum of $66.00 an award to Martha Connols, Administratrix of the estate of Hugh Hankins, deceased, the sum of $1,000.00.

(No. 1777—Claim denied.)

JOHN T. GARVINS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1933.

CHARLES G. SEIDEL, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*not applied to all employees of State.* The Workmen's Compensation Act does not automatically apply to all employees of the State, but only when they are engaged as such in an employment in a department of the State which is engaged in extra hazardous enterprises named in the Act.

SAME—*employment not extra hazardous—when award denied.* An attendant at State hospital is not engaged in extra hazardous employment and if injured while so employed, no award for compensation will be made.

Mr. JUSTICE VAUSE delivered the opinion of the court:

Claimant seeks to recover compensation under the terms of the Act commonly known as the Workmen's Compensation Act for an injury claimed to have been suffered by him February 19, 1931, while employed as an attendant at the Elgin State Hospital. The nature of the injury alleged is a left side inguinal hernia, claimed to have been received by the claimant while he, assisted by three inmates of the institution, was carrying a hand stretcher containing a dead body into the morgue of the institution where he was employed, and that

the injury arose out of and in the course of his employment. The accident occurred by one or more of the inmates holding on to the other end of the stretcher from the claimant, moving in such a way that the end of the pole of the stretcher struck claimant in the left side.

The statute granting this court jurisdiction to hear and determine claims for compensation to State employees is contained in sub-paragraph 6, Section 6 of the Act creating this court, Smith Hurd's Statutes, 1931, Chapter 37, Paragraph 432, and is as follows:

"(6) To hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by any employee of the State, such determination to be made in accordance with the rules prescribed in the Act commonly called the 'Workmen's Compensation Act,' the Industrial Commission being hereby relieved of any duty in connection thereto."

By Paragraph 3 of the Workmen's Compensation Act, Smith Hurd's Statutes, 1931, Chapter 48, Paragraph 139, it is provided that the provisions of the Workmen's Compensation Act shall apply automatically to the State as an employer "and to all employers and all their employees engaged in any department of the following enterprises or businesses which are declared to be extra-hazardous, namely:" and thereafter the statute sets out ten sub-paragraphs declaring the extra-hazardous businesses or enterprises.

The Workmen's Compensation Act does not automatically apply to all employees of the State, but is available to such employees only when they are engaged as such employees in an employment in a department of the State which is engaged in the named extra-hazardous enterprises. *Village of Chapin* vs. *Industrial Commission*, 336 Ill. 461.

In determining what enterprises of the State are extra-hazardous, this court is bound by the enactment of the Legislature of the State as set forth in the sub-paragraphs of Section 3 of the Workmen's Compensation Act above referred to, and if the employment of the claimant was not such at the time of the alleged injury as brought him within the terms of the Workmen's Compensation Act, this court has no authority to award compensation.

We have carefully considered the evidence in this case and we find nothing therein which brings the employment of the claimant at the time of the alleged injury within any of the

extra-hazardous enterprises declared by Section 3 of the Workmen's Compensation Act.

The claimant in his employment not being within the terms of the Workmen's Compensation Act, this court is without any authority to make an award in his favor. Therefore, the claim is denied and the suit dismissed.

(No. 1804—Claimant awarded $4,275.94.)

JANIE HARTLEY, ADMINISTRATRIX OF THE ESTATE OF J. O. HARTLEY, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1933.

JOHN H. SEARING, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for the State.

WORKMEN'S COMPENSATION ACT—*when award will be made under.* Where claimant sustains injuries arising out of and in course of his employment, while engaged in employment found to be extra hazardous, an award will be made under provisions of Workmen's Compensation Act.

Mr. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant filed her petition as administratrix of the estate of J. O. Hartley, deceased, to recover compensation under the Workmen's Compensation Act of 1911, subsequently amended, for damages suffered by reason of the death of her husband while in the employ of the respondent as a bridge painter on S. B. I. Route 2, Division of Highways, Department of Public Works and Buildings.

The undisputed facts are that the deceased, J. O. Hartley, died on June 15, 1931, from the effects of personal injuries incurred when he accidentally fell from a bridge scaffolding to the ground below, a distance of thirty-five or forty feet. As a result of the fall, his body was pierced or impaled by a tent stake sticking up from the ground about eighteen inches and he died before he could be removed to a hospital.

The deceased had only been employed by the respondent a short time prior to the accident. His rate of wage at the time was $21.60 per week. He had been employed at various occupations as a steeplejack, millwright, railroad machinist,

salesman and painter. Just what his exact average annual earnings were is somewhat in doubt, but it fully appears that they were at least $1,000 a year.

Besides his widow, the deceased left him surviving, two dependent minor children, Velma, a daughter, age fifteen years, and Russell, a son, age eight years, at the time of the death of their father.

Under the provisions of Section 7(a) of the Workmen's Compensation Act, then in force, the widow would, therefore be entitled to a maximum award of $3,750.00, which on account of the two dependent minor children is increased, by subsequent sections to the sum of $4,550.00.

It appears from the evidence that at the time of his injury and death, the deceased was in the employ of the State in one of the extra-hazardous occupations enumerated in the Compensation Act, and comes within Section 3 of the Act as extra-hazardous.

The Attorney General does not dispute the facts, but recommends that claimant be awarded not to exceed $4,550.00.

We find that the recommendations of the Attorney General are in accordance with the statute and the facts in this case and make an award in the sum of $4,550.00, which must be commuted under the statute.

We anticipate that an appropriation for an award will be payable about August 1st.

The deceased's injury and death occurred June 15, 1931. There would therefore be 110 3/7 weeks of earned compensation. The total compensation would ordinarily run 416 weeks. Under the Compensation Act, his beneficiary would receive $10.94 per week. There would be 305 4/7 weeks to be commuted. The sum that the administratrix therefore will receive is $4,275.94, and we recommend that an appropriation be made in that sum, payable to Janie Hartley, as the administratrix of the estate of J. O. Hartley, deceased. Inasmuch as there are two children under sixteen years of age, we deem it advisable that it be paid in that way.

(No. 1879—Claimant awarded $1,760.12.)

JOHN ROBINSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1933.

JOHN ROBINSON, pro se.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ Assistant Attorney General, for respondent.

CONTRACTS—*extra work—when award may be made.* Where claimant performs extra work in connection with contract, but bill therefor is not presented for payment before lapse of appropriation out of which it should be paid, an award will be made for amount due upon recommendation of Attorney General.

Mr. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

The claimant, John Robinson, seeks to recover compensation for extra work done by him in connection with the construction of the Cairo Armory at Cairo, Illinois, during the spring of 1931.

On February 20th, 1931, the respondent advertised for bids for the construction of an Armory in the City of Cairo, and thereafter the contract for the construction of such Armory was awarded to the claimant, John Robinson, who furnished the bond required by law and immediately commenced work under his contract.

After he began work it was ascertained that on account of peculiar sub-soil conditions in Cairo, it was necessary to revise the plans and specifications upon which the original contract was based. Such revision was made on March 25th, 1931, and on April 7th, 1931 the extra work required by such change in specifications was authorized by the Division of Architecture and Engineering of the Department of Purchases and Construction.

The unit items called for in the original contract were paid in due course as the work progressed, and no part of the original costs are involved in this claim. The extra work was done in accordance with the revised plans and specifications and was satisfactory to the department having charge of the work. The claimant was notified that the appropriation out of which payment for such extra work would be paid would

lapse on June 30th, 1931, but notwithstanding that fact, he failed to file his bill within the required time and the appropriation therefore lapsed before payment was made.

It is conceded, however, that the bills were presented within a reasonable time. Under date of February 29th, 1932, the Department of Purchases and Construction reported that the claimant's claim to the extent of Eighteen Hundred Seventy-four Dollars and Fifty-three Cents ($1,874.53) had the approval of such department. Thereafter a stipulation was entered into and filed herein on the 22nd day of March, A. D. 1933, wherein and whereby it was stipulated and agreed by and between the claimant and the Attorney General upon the recommendation of the Division of Architecture and Engineering of the Department of Purchases and Construction, that the actual loss and reasonable damage sustained by the claimant on account of the aforementioned revision of plans, was Seventeen Hundred Sixty Dollars and Twelve Cents ($1,760.12) and an itemized and detailed statement of which said loss and damage was made a part of such stipulation.

There is no question but what the claimant performed the work in question, and it is admitted that the same was completed to the satisfaction of the Division of Architecture and Engineering of the Department of Purchases and Construction, and the Attorney General has recommended the allowance of the claim to the extent of Seventeen Hundred Sixty Dollars and Twelve Cents ($1,760.12).

IT IS THEREFORE ORDERED, That an award be entered in favor of the claimant in the amount of Seventeen Hundred Sixty Dollars and Twelve Cents ($1,760.12).

(No. 1896—Claim denied.)

MATTIE L. BUCHOLZ, ADMINISTRATRIX OF THE ESTATE OF HENRY G. BUCHOLZ, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1933.

WALTER J. MILLER AND WALTER J. WENGER, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for the State.

PERSONAL INJURY—*when State not liable for personal injuries sustained by reason of accident on State highway—governmental functions.* In the construction and maintenance of public highways the State exercises a governmental function and is not liable for damages caused by either a defect in the construction or failure to maintain it in a safe condition for travel unless there is a statute expressly making it so liable.

Mr. JUSTICE VAUSE delivered the opinion of the court:

This is a claim filed by Mattie L. Buchholz, Administratrix of the estate of her deceased husband, Henry G. Buchholz, seeking to recover Twenty Thousand Dollars ($20,000.00) damages on account of the death of her husband on October 19, 1931, resulting from personal injuries received October 14, 1931, when a Lincoln automobile deceased was driving left the pavement and collided with a concrete culvert at the side of the road. The accident occurred on the evening of October 14, 1931 about 6:20 p. m., while deceased alone was driving a Lincoln Sedan southeast on State Bond Issue Route No. 60, known as Rand Road, in DuPage County, Illinois, and about 185 feet southeast of the intersection of this road as what is known as the Arlington Heights Road.

According to the testimony Arlington Heights Road runs about north and south and Rand Road intersects it from a northwesterly to a southeasterly direction to one approaching toward the city of Chicago. Deceased was driving southeast on Rand Road approaching the intersection with Arlington Heights Road and while the evidence is not clear it can be reasonably inferred therefrom that a car approaching this same intersection from deceased's right travelling north along Arlington Heights Road turned to the left in this intersection ahead of and across the line of deceased's approach for the purpose of turning to the northwest along Rand Road. Following this deceased crossed the intersection, proceeded along Rand Road but ran off of the pavement on the left hand side and into a ditch and crashed against a headwall of the concrete culvert located on the left hand side of Rand Road and at a point about 185 feet southeast of the intersection.

As a result of his injuries received, deceased developed traumatic pneumonia and died. Both the Rand Road and the Arlington Heights Road were owned and controlled by the State of Illinois. Claimant's declaration counts upon a

negligent failure on the part of the State of Illinois to erect traffic signs or signals indicating a curve in Rand Road at or near this intersection, by reason of which negligence, claimant's intestate was injured and from which injury he died. Considerable testimony appears in the record to show the condition and manner of construction of the road in question at this intersection and to show that there was a curve in the road known as Rand Road which was not indicated by warning signals.

In the opinion of the court, however, it is not necessary to discuss at length the circumstances surrounding the death of claimant's intestate as shown by the record. As previously stated, the record discloses that the Rand Road, of which complaint is made as to the method of construction and maintenance was built by and is owned and controlled by the State of Illinois. In the construction and maintenance of its roads, the State acts in the governmental capacity and in the exercise of such governmental functions it does not become liable in actions of tort by reason of the malfeasance, misfeasance or negligence of its officers or agents in the absence of a statute creating such liability. Such has been the settled decision of this court for many years. *Morrissey* vs. *State of Illinois*, 2 Court of Claims Reports, 454; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549.

The General Assembly has never enacted a law making the State liable for damages caused by the negligent construction or maintenance of a public road and this court has no power to make an award for such damages in the absence of such a statute. *Chumbler* vs. *State of Illinois*, 6 Court of Claims Reports, 138.

The claim is denied and the cause dismissed.

(No. 1899—Claimant awarded $73.24.)

HARRY N. ALEXANDER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1933.

LAWLER & GREENING, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for the State.

WORKMEN'S COMPENSATION ACT—*when award will be made under.* Where claimant sustains injuries arising out of and in the course of his employment, while engaged in an employment declared to be extra hazardous, an award will be made under the provisions of the Workmen's Compensation Act.

Mr. JUSTICE VAUSE delivered the opinion of the court:

This is a claim filed by Harry N. Alexander against the State of Illinois seeking to recover compensation for temporary total disability and costs of medical attention under the Workmen's Compensation Act for accidental injuries received by him as such an employee arising out of and in the course of his employment as a laborer in the State House power plant in Springfield, Illinois.

It appears from the stipulation of fact entered into between the attorney for the petitioner and the Attorney General representing the State of Illinois that the claimant was, on the 29th day of January, 1932, an employee of the State of Illinois engaged in an extra-hazardous employment and on that date he suffered accidental injuries arising out of and in the course of his employment; that notice of the accident was given to the respondent and claim for compensation on account thereof within the time required under the provisions of the Act; that the earnings of the petitioner at the time of the injury were at the rate of Twelve Hundred Fifty-eight Dollars and Forty Cents per year, and that the average weekly wage was Twenty-four Dollars and Twenty Cents ($24.20) per week. Petitioner, at the time of the injury was forty-eight (48) years of age and had two minor children aged ten and fifteen years respectively, dependent on him for support at the time of the injury. Necessary first aid, medical services and hospital services have not been provided by the respondent and the amount thereof is the sum of Forty-five Dollars ($45.00); that claimant is entitled to receive from the respondent said sum of Forty-five Dollars ($45.00) for medical and surgical services; that claimant suffered no permanent disability and is entitled to receive from the respondent total temporary disability compensation for a period of ten (10) weeks at the rate of Thirteen Dollars and Thirty-one Cents ($13.31) per week as provided by Section 8-J (1), or a total of One Hundred Thirty-three Dollars and Ten Cents ($133.10); that claimant has been paid by re-

spondent the sum of One Hundred Four Dollars and Eighty-six Cents ($104.86) of this amount, leaving a balance of Twenty-eight Dollars and Twenty-four Cents ($28.24) compensation still due and unpaid.

Petitioner is entitled to receive the sum of Twenty-eight Dollars and Twenty-four Cents ($28.24) as compensation plus medical and surgical services amounting to Forty-five Dollars ($45.) or a total of Seventy-three Dollars and Twenty-four Cents ($73.24).

Petitioner is therefore allowed an award in the sum of Seventy-three Dollars and Twenty-four Cents ($73.24).

(No. 1953—Claimant awarded $3,990.57.)

THORNTON CARTAGE COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1933.

CAMERON & HEALTH, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*when award will be made for damages sustained, by reason of delay caused solely by State.* Where claimant sustains damages under his contract for grading and paving of hard road, caused solely by reason of delay of State Department in securing portion of right of way, and not through fault of claimant nor attributable to any failure on his part in protecting himself from effects of delay which might have reasonably been foreseen, an award will be made, upon stipulation of proper department and recommendation of Attorney General.

SAME—*State's improper suspension of work constituting breach.* Where contract states no time for completion and State improperly suspends work thereon, resulting in delays, preventing completion of same within a reasonable time, contractor being ready, able and willing to proceed, such action of State amounts to a breach of contract rendering it liable for damages.

Mr. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant is seeking damages to the extent of $6,393.35 from the State as damages, because the Department of Public Works and Buildings failed to furnish a portion of the necessary right-of-way required for the construction project with resulting changes in the plans and specifications of a certain contract. The original contract was No. 4257, and was

executed on October 4, 1930, and provided for certain grading operations and hard road construction on S. B. I. Route 19, Section 70, A-2, in Cook County. The contract contemplated *construction of a newly located portion of said S. B. I. Route* 19 at its intersection with the county highway known as Dundee Road. In addition, an underpass was to be constructed where it crosses Dundee Road, and a ramp or connecting highway was to be constructed leading from Route 19, west of the intersection, connecting it with the Dundee Road. The ramp was to be constructed north of Route 19 and running in a parallel direction.

There was a stipulation of facts.

It appears that the first delay of sixteen (16) days occurred between October 9th and 28th, 1930, two days after the work was started and during this time a portion of claimant's equipment remained idle. This temporary suspension was ordered by the Division of Highways when it was discovered that right-of-way for the north ramp had not been secured from the Forest Preserve District of Cook County. Question had arisen in regard to its precise location.

Originally the plans had called for work to be commenced in grading operations on the north ramp and this change in plans and specifications was the cause of the first delay period. Claimant then began work on the new location of the right-of-way on Route 19, all of which had been secured. He was engaged in this work until February 12, 1931, when claimant was directed to build it at a new location. There was sixty-three (63) days in this second period of delay from February 12 to April 27, 1931. The items of claim for the two periods of delay involved idle equipment resulting therefrom.

The original contract price was $71,533.10 for this work. It was essentially a grading contract with a small amount of concrete pavement. In the letter of award it was specifically stated that certain right-of-way, namely from Station 43/50 to Station 45/10, from Station 49/00 to Station 59/00, and from Station 139/00 to Station 145/00 had not been acquired and that the contractor should not start work within these limits until further notified. The contractor at that time was also advised that he should start work on the re-

mainder of the section immediately, which included the proposed north ramp, between Station 1/00 to Station 11/30.

The amount claimed as damages was on account of delays encountered which were not referred to in the paragraph above stated, and which supposedly were clear at the time of the award.

The contractor claims damages to the extent of $2,410.40 for delays to his grading equipment for the period from October 10th to October 28th, when he was unable to operate on account of right-of-way difficulties. It appears that the contractor moved in good faith and that just before starting construction operations, he was notified by the engineer that on account of right-of-way difficulties no work should be done within certain limits. It was not possible to work at other points during that time and he was obliged to lay up his outfit for sixteen (16) days.

It also claims $3,982.95, which is likewise due to the right-of-way difficulties, and it appears from the record that the contractor performed all the work possible where the right-of-way was clear, and he was obliged to lay up his outfit for the period from February 12 to April 27, when he was notified that certain portions of the right-of-way were clear.

The questions here presented are:

1. Whether or not a contractor is justified in presenting a claim for delays which arise due to right-of-way, bearing in mind that at the time of the award the right-of-way was supposedly clear and that in so far as the contractor knew, he was privileged to move in equipment and start work. There is no controversy about the facts under this breach.

2. The second question is whether the prices charged for equipment were fair and reasonable for equipment of this character. The prices of the Associated General Contractors of America are recognized as the general standard.

A report from Frank T. Sheets, Chief Highway Engineer, on September 30, 1932, addressed to the Attorney General, contained the above facts.

A further report was received on March 21, 1933, from Ernst Lieberman, Chief Highway Engineer. This contained copies of "Stipulation of Reasonable Damage." In connection herewith, the items and facts were all carefully checked and it appears that while most of the contract price had been

paid, claimant for its work under the contract, that final payment estimate covering a small sum had not at that time been paid. We have examined blue prints, the abstract of evidence and photostatic copies of the contract, etc., and it appears that the facts herein contained, are substantially correct.

The stipulation of reasonable damages resulted from a close check of all items of the claim by the Division of Highways and resulted from mutual agreement with the department. These amounts are all based on A. G. C. ratings for idle equipment, which seems to be universally recognized as fair and reasonable by contractors and engineers, and this sum was fixed at $3,990.57.

The State is liable for the actual damages arising from unreasonable delay caused solely by the State and not through fault of the contractor, nor attributable to his failure in protecting himself from the effects of delays which might reasonably have been foreseen.

Powers-Thompson Const. vs. *State*, 5 C. C. R. 180.
Hoier V. State, 6 C. C. R. 130.
Henkel Constr. Co. vs. *State*, 6 C. C. R. 222.
Carson vs. *State*, 6 C. C. R. 520.

Where a contract states no time for completion, and the governments improper suspension of the work results in delays, so that the contract could not complete within a reasonable time, such action in effect amounts to a breach of the agreement and the government is liable for the actual damages sustained by the contractor.

Smith vs. *U. S.*, 11 C. Cls. 707; Aff'd., 94 U. S. 214.
Rodgers, et al. vs. *U. S.*, 48 C. Cls. 443.
Swift vs. *U. S.*, 14 C. Cls. 208.
Figh vs. *U. S.*, 8 C. Cls. 319.

The Attorney General has recommended that the claimant be awarded the sum of $3,990.57, in full settlement of all damage. In view of the foregoing authorities and the facts as they appear before us, and the stipulations contained in the record, we award the claimant the sum of $3,990.57 in full settlement of all damages.

(No. 1978—Claimant awarded $4,534.32.)

LURA SUTTON, ADMINISTRATRIX OF THE ESTATE OF GRADY SUTTON, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1933.

MILEY & COMBS, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made.* Where a State employee sustains accidental injuries arising out of and in course of employment while engaged in extra hazardous occupation an award will be made under provisions of Workmen's Compensation Act.

SAME—*employee.* A highway patrol officer is an employee of the State and not an official thereof.

Mr. JUSTICE VAUSE delivered the opinion of the court:

This is a claim by Lura Sutton, Administratrix of the Estate of Grady Sutton, for compensation on account of the accidental death of Grady Sutton on July 1, 1932. The evidence discloses that Grady Sutton was on that date in the employ of the State of Illinois as a State highway patrolman in the Department of Public Works and Buildings of the State of Illinois, pursuant to Paragraph 249, Chapter 121, Smith Hurd's Revised Statutes, 1931. The evidence discloses that the deceased on the above date, while in the line of his duty as such State highway patrolman, while assisting officers of Saline County, Illinois, in arresting three men under suspicion as being automobile thieves, was shot and killed by one of the alleged thieves while in the custody of the deceased and the Chief of Police of the City of Harrisburg, Illinois and while the said alleged thieves were being taken under arrest to jail in Harrisburg. The evidence further discloses that the deceased left surviving him his widow, Lura Sutton, and two children under the age of sixteen years who were totally dependent upon him for support; that all medical and hospital bills have been paid by the State.

Th authority given to this court to hear and determine claims for compensation for the accidental injury or death of State employees is fixed by Sub-paragraph 6 of Section 6 of the Act of the Legislature creating this court, which provides as follows:

"(6) To hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by any employee of the State, such determination to be made in accordance with the rules prescribed in the Act commonly called the 'Workmen's Compensation Act', the Industrial Commission being hereby relieved of any duty relative thereto." Smith-Hurd Statutes, 1931, Chapter 37, paragraph 432.

By virtue of Section 3 of the Workmen's Compensation Act, the terms of said Act apply automatically and without election to the State and by Section 5, the term "employee" as used in the Workmen's Compensation Act means every person in the employ or service of the State except any official of the State.

Highway patrol officers, such as the deceased, are appointed by the Department of Public Works and Buildings of the State of Illinois. Their tenure is at the will of the department. The character of their service and tenure make such highway patrol officers employees rather than officials. *City of Pekin* vs. *Industrial Commission*, 341 Ill. 312, 317, 318. There is no dispute in the record but that the deceased came to his death from an accidental injury arising out of and in the course of his employment. Claimant as his administratrix is therefore entitled to the allowance of an award by this court.

The salary of the deceased was One Hundred Seventy-five Dollars ($175.00) per month. The deceased left surviving him a legal widow and two (2) children under sixteen years of age, totally dependent upon him for support at the time of his death. Under paragraphs 7(a) and 7(h)3, the claimant would be entitled to an award of Forty-eight Hundred Dollars ($4,800.00) if paid in installments. Under Section 8, the claimant would be entitled to maximum payments of Sixteen Dollars ($16.00) per week. Commuted to a lump sum settlement on the basis of weekly payments, claimant is entitled to a lump sum award of Forty-five Hundred Thirty-four Dollars and Thirty-two Cents ($4,534.32).

An award of Forty-five Hundred Thirty-four Dollars and Thirty-two Cents ($4,534.32) in favor of the claimant as administratrix of the estate of Grady Sutton, deceased, is therefore allowed.

(No. 1993—Claimant awarded $1,272.55.)

L. C. MILLER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1933.

HINCHCLIFF, MILLER & THOMAS, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

SERVICES AND EXPENSES—*when award will be made.* Where it is conceded that claimant rendered services and incurred expense as an employee of the Temporary Commission to Investigate the Advisability or Need of a General Revision of the Laws Relating to Elections, which commission was empowered by the Act creating it to engage employees, and has not been paid therefor, because of lapse of appropriation for the purpose, and amount is unquestioned, an award will be made for such services and expenses.

Mr. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

The Fifty-sixth General Assembly of the State of Illinois enacted a statute entitled "An Act to Create a Temporary Commission to Investigate the Advisability or Need of a General Revision of the Laws Relating to Elections, to Make Recommendations Relating Thereto and to Draft any Proposed Legislation and Make an Appropriation Therefore." Section two (2) of such Act provides as follows:

"Sec. 2. The Commission shall have power to elect a chairman from among its members and secretary from among its members or otherwise, and to appoint and at pleasure remove such expert help and other assistants as may be necessary to the purpose for which it is created." (L. 1929, p. 39.)

Pursuant to such enactment of the Legislature, Hon. Louis L. Emmerson, then Governor, appointed the following named persons as Commissioners to carry out the provisions of such Act, to-wit: Edmund K. Jarecki, Milton J. Foreman, and James S. Baldwin.

On December 19, 1930, the Commission, pursuant to the authority given in the aforementioned statute, engaged and employed the claimant, L. C. Miller, as an expert to assist in its work under the aforementioned statute.

From the stipulation of facts heretofore filed herein, it appears that the claimant was to receive for his services a minimum fee of One Thousand Dollars ($1,000.00), together

with an allowance of expense money in the amount of Five Hundred Dollars ($500.00), with the understanding that if any part of such expense money were not actually expended, the remainder would be paid to the claimant in addition to the aforementioned minimum fee of One Thousand Dollars ($1,000.00).

The claimant accepted the appointment and continued therein until the 30th day of January, A. D. 1931, and occasionally thereafter until the 1st day of June, A. D. 1931, when the work of the Commission was completed.

At the time the claimant was appointed by the Commission, there was an unexpended balance of Fifty-three Hundred Seventy Dollars and Ninety-two Cents ($5,370.92) in the appropriation made for such Commission. On June 1st, 1931, the date on which the work of the Commission was completed, there was a balance of Thirteen Hundred Eighty-eight Dollars and Eighty-three Cents ($1,388.83) in such fund, which balance was afterwards exhausted without any payment to the claimant except the sum of Two Hundred Twenty-seven Dollars and Forty-five Cents ($227.45), which was paid to him to apply on his expense account.

No question is raised as to the value of the services rendered or the reasonableness of the charge made. Under the stipulation entered into by and between the Attorney General and the claimant, it appears that there is due and owing to the claimant for the services rendered by him to such Commission, the agreed minimum fee of One Thousand Dollars ($1,000.00), and in addition thereto the sum of Two Hundred Seventy-two Dollars and Fifty-five Cents ($272.55), being the unexpended balance of the aforementioned allowance for expenses.

IT IS THEREFORE ORDERED, That an award be entered in favor of the claimant in the amount of Twelve Hundred Seventy-two Dollars and Fifty-five Cents ($1,272.55), in full settlement and satisfaction of all claims for services and expenses in connection with his work for such Commission.

(No. 2016—Claimant awarded $300.00.)

F. E. OLLEMAN, DOING BUSINESS AS CENTRAL FILM SERVICE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1933.

WILLIAM C. THON, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*when award will be made.* Where evidence is undisputed that claimant leased certain property to State institution, under arrangement that same was to be returned in good condition, an award will be made where same is damaged beyond repair, for the fair market value thereof.

MR. JUSTICE VAUSE delivered the opinion of the court:

This is a claim filed by claimant, F. E. Olleman, doing business as Central Film Service to recover from the respondent damages to a four-reel moving picture film leased by the Illinois School for the Deaf, Department of Public Welfare from the claimant.

The Attorney General, representing the respondent, admits that under the leasing arrangement, the film was to be returned to the claimant in good condition and that from all the facts in the record it appears that the film was damaged beyond repair while in the respondent's possession at Jacksonville, Illinois. The undisputed evidence is that the fair market value of the film was three hundred dollars ($300.00) and that the same was damaged *beyond* repair.

Under this state of facts, claimant is entitled to recover the value of the film, and claim is hereby allowed to the claimant in the sum of Three Hundred Dollars ($300.00).

(No. 2028—Claimant awarded $3,818.97.)

ELMA PENNINGTON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1933.

BARR & BARR, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made.* Where State employee sustains accidental injuries, arising out of and in course of his employment, while engaged in extra hazardous employment, resulting in his death, award will be made for compensation under provisions of Workmen's Compensation Act.

SAME—*injury sustained while attempting to save life of fellow employee.* It is the duty of an employee to do what he can to save the life of a fellow employee, when all are at the time working in the line of their employment, and if injured while so doing, such injuries will be deemed to have arose out of and in course of employment.

Mr. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

For more than two years prior to June 24th, 1932, Elvis Pennington was in the employ of the Division of Highways, Department of Public Works and Buildings, as a maintenance laborer in District No. 1. On the last mentioned date, in company with three other employees, Pennington was engaged in spraying Canadian thistles with chlorate of soda, along the right-of-way of S. B. I. Route No. 71. Chlorate of soda is not inflammable when in a dry state, before having been mixed with water, nor is the solution inflammable when mixed with water; but after the solution dries a chemical change takes place and thereafter it is highly inflammable.

In using the spray, the clothing of the men naturally became saturated with the solution which dried during the course of their work. The four employees had completed their work on one patch of thistles, and were riding to another patch in an automobile, when one of the men, Glenn Biertz, struck a match to light a cigaret. His clothing became ignited and he jumped from the automobile and was rolling around in the grass by his fellow workmen in an attempt to extinguish the flames. Pennington who was riding on the running board of the automobile immediately jumped off and ran to the assistance of Biertz. As the result of his attempt to aid his co-worker, Pennington's clothes became ignited and he was very severely burned, and died two days later in the hospital at Aurora as the result of such burns.

Elvis Pennington left him surviving Elma Pennington, his widow, the claimant herein, and no children. His wages were Thirty-three Dollars ($33.00) per week or Seventeen Hundred Sixteen Dollars ($1,716.00) per annum. No ques-

tion as to the making of claim for compensation arises for the reason that the declaration herein was filed within six months after the date of the accident.

The maintenance of hard-surfaced highways constitutes "the maintaining of a structure" within the meaning of those words as used in Section Three (3) of the Workmen's Compensation Act of this State. (*City of Rock Island* vs. *Industrial Commission*, 287 Ill. 76.) The work upon which Pennington was engaged was in fact extra-hazardous, and consequently the claimant is entitled to recover compensation under the terms and provisions of the Workmen's Compensation Act, provided the injuries which caused the death of Elvis Pennington arose out of and in the course of his employment.

The Supreme Court of this State, in the case of *Dragovich* vs. *Iroquois Iron Co.*, 269 Ill. 478, said (page 484);

"It is clear that it is the duty of an employed to save the lives of his employees, if possible, when they are in danger while in his employment, and therefore it is the duty of a workman in his employ, when occasion presents itself, to do what he can to save the lives of his fellow employees when all are at the time working in the line of their employment."

The same rule was announced in the case of *Baum* vs. *Industrial Commission*, 288 Ill. 516. It appears therefore, that the injuries which caused the death of the decedent arose out of and in the course of his employment, and his widow therefore is entitled to compensation under the terms and provisions of the Workmen's Compensation Act. Under the provisions of Section 7A of the Compensation Act, the amount to which the widow is entitled is limited to Four Thousand Dollars ($4,000.00). Inasmuch as payment is to be made in a lump sum, this amount must be commuted to an equivalent lump sum in accordance with the provisions of section nine (9) of the Compensation Act.

The amount to which the claimant is entitled, as thus commuted, is Thirty-eight Hundred Eighteen Dollars and Ninety-seven Cents ($3,818.97).

IT IS THEREFORE ORDERED, That an award be entered in favor of the claimant in the amount of Thirty-eight Hundred Eighteen Dollars and Ninety-seven Cents ($3,818.97).

(No. 2029—Claimant awarded $4,289.81.)

MARION I. CHURCH, ADMINISTRATRIX OF THE ESTATE OF KENNETH L. CHURCH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1933.

WILLIAM L. LEECH, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made for injury resulting in death of State employee.* Where it is undisputed that claimant's intestate, a State highway maintenance policeman, sustained accidental personal injuries, causing his death, arising out of and in course of his employment, an award will be made for compensation for same, and amount computed under provisions of Workmen's Compensation Act.

SAME—*extra hazardous employment.* The duties of a State highway maintenance policeman are extra hazardous in fact, and of such a nature as to be properly classified as extra hazardous under the Workmen's Compensation Act.

Mr. JUSTICE LINSCOTT delivered the opinion of the court:

The declaration in this case sets forth that on the 5th day of December, A. D. 1931, Kenneth L. Church was in the employ of the State of Illinois as a motorcycle highway patrolman, which position he had occupied for about seven years. It was a part of his duties to patrol the highways of the State of Illinois, particularly the highways leading from the City of Dixon, Illinois; that on the said 5th day of December, 1931, he was patroling route number two between the cities of Dixon and Amboy, under orders from his superior officer, and was directing a funeral near the city of Amboy, Lee County, Illinois, and while returning to Dixon, one Burton L. Reed carelessly, recklessly and negligently collided with him while he was riding a motorcycle and the said Kenneth L. Church was thrown upon the ground, from which he received injuries and died at the Dixon Public Hospital about one hour after the injury occurred.

He was thirty-six years of age and left him surviving, his wife, Marion I. Church, and Kenneth L. Church, Jr., a son eleven weeks old at the time of the injury. The said deceased was living with his wife and baby and they were wholly dependent upon him.

The facts are not in dispute. At the time deceased died, he received One Hundred Fifty Dollars ($150.00) per month from the State for his services. There was a small hospital bill and medical bill, which were paid by the State.

This court has held that deceased's duties, that of a State Highway Maintenance Policeman, are extra-hazardous in fact and of such a nature as to be properly classified as extra-hazardous under the Compensation Act. His duties required him to assist in maintaining the State hard road system and are considered as coming within Section 3 (1) and/or section 3 (3) of the Workmen's Compensation Act of 1911, as subsequently amended.

Under the provisions of section 7 (2) of the Workmen's Compensation Act, a widow is entitled to the maximum amount of $4,000.00 on account of the death of her husband. This amount is increased by Paragraph (h) 3 of the same section to $4,450.00 in the case of one dependent minor child under the age of sixteen years at the time of the death of the employee.

If the Legislature should make an appropriation in this case, we estimate it would be available for claimant on or about August 1st, 1933. Therefore, nothing should be commuted upon the payments which should have been made up to that time, and commuting the balance of the payments, pursuant to the Compensation Act, we find that the claimant receive the sum of Four Thousand Two Hundred Eighty-nine Dollars and Eighty-one Cents ($4,289.81).

We, therefore, recommend to the Legislature that an appropriation be made, payable to the order of Marion I. Church, administratrix of the estate of Kenneth L. Church, deceased, in the sum of $4,289.81.

(No. 2045—Claimant awarded $4,821.42.)

FRANK E. HERDMAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1933.

HEINEMAN, RONAN & LANGSETT, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*when award may be made for damages sustained on account of delay caused by action of State.* Where claimant sustains loss under his contract for construction of bridges, through no fault of his own, but occasioned solely by State, in order to revise plans and specifications and secure approval thereof by United States War Department, an award will be made upon recommendation of Attorney General.

Mr. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

The claimant, Frank E. Herdman, who was awarded the contract for the construction of the Fox River Bridge on S. B. I. Route 173, Section 134-B, in Lake County, filed his declaration in this court on the 9th day of January, A. D. 1933, seeking to recover the sum of Seventy-six Hundred Thirty-eight Dollars and Seventy-three Cents ($7,638.73) as damages which he claims he sustained as the result of delay occasioned by necessary changes made by the respondent in the original plans and specifications for the construction of such bridge.

The original contract between the claimant and the respondent was executed June 10th, 1931, and provided for the construction of three bridges, known respectively as the Fox River Bridge, the Midway Bridge, and the Channel Bridge, all on S. B. I. Route No. 173 in Lake County.

The contract called for completion of the work by October 15th, 1931. Claimant commenced work on the Midway Bridge on June 20th, 1931, and on the Channel Bridge on June 26th, 1931, and arranged and coordinated the work and the distribution and placement of materials, labor and machinery on all bridges to expedite the work and reduce the cost of construction. Claimant also furnished the District Engineer of the Division of Highways, Department of Public Works and Buildings, with a progress chart setting forth the methods by which and the times when the construction of the sub-structure and super-structure of the three bridges would be made.

Work on the Fox River Bridge was commenced on July 15th, 1931, and it was then ascertained by the respondent that it would be necessary to change the plans and specifications so as to provide for a four-span bridge instead of a three-span bridge at that point. On July 16th, 1931, claimant was instructed by the District Engineer at Elgin, Illinois to dis-

continue work on said bridge, and to hold up the shipment of materials for the reason that it would be necessary to revise the plans and secure approval thereof by the United States War Department, the Fox River being a navigable stream. Approval of the War Department was thereafter secured, and work was resumed on September 9th, 1931. The work on the other two bridges was completed within the time required, and the work on the Fox River Bridge was completed December 22nd, 1931.

On account of the aforementioned revision of plans, and the delay resulting therefrom, the claimant was required to maintain his equipment and administrative and operative personnel on the work longer than would otherwise have been necessary.

After the filing of the declaration herein, the matter was referred to the Chief Highway Engineer for an investigation and report. Under his direction the claim of the claimant, together with his cancelled checks and receipted bills, were checked and audited, and thereafter it was stipulated and agreed by and between the claimant and the representative of the Division of Highways that the claimant is entitled to recover the following items of damages on account of delay caused by the action of the respondent and without any fault on the part of the claimant, to-wit:

Equipment rental	$2,130.71
Salaries and overhead	2,319.71
Compensation insurance	126.85
Camp and storage expense	244.15
Total	$4,821.42

Thereafter, to-wit, on April 14th, 1933, the claimant filed an amended declaration setting up the items of damages sustained by him as above set forth. On April 28th, 1933, a stipulation was entered into between the claimant and the respondent by Ernest Leiberman, Highway Engineer of the Division of Highways of the State of Illinois which stipulation was filed in this court on the last mentioned date, and which provided in effect that the amount of damages reasonably sustained by the claimant as the result of the delay complained of, was Forty-eight Hundred Twenty-one Dollars and Forty-two Cents ($4,821.42).

The liability of the State to respond in damages in cases of this character, where delay has been caused by the action of the State, and without any fault on the part of the contractor, has been recognized in numerous cases in this court, as well as in the Federal Court of Claims. *Hoier* vs. *State*, 6 C. C. R. 130; *Henkel Construction Co.* vs. *State*, 6 C. C. R. 222; *Carson Co.* vs. *State*, 6 C. C. R. 520; *Kellogg Bridge Co.* vs. *United States*, 46 U. S. C. C. 139. There is no dispute as to the facts and no question but what the delay in question was caused by the action of the respondent and without any fault on the part of the claimant; it has been stipulated that the damages reasonably sustained amount to the sum of Forty-eight Hundred Twenty-one Dollars and Forty-two Cents ($4,821.42), and the Attorney General has recommended that an award in that amount be allowed.

IT IS THEREFORE ORDERED, That the claimant be awarded the sum of Forty-eight Hundred Twenty-one Dollars and Forty-two Cents ($4,821.42) in full of all damages sustained by him.

(No. 2070—Claimant awarded $1,269.54.)

ROBERT W. KENNEDY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1938.

L. M. GREEN, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when claim for compensation within six months waived.* Where compensation is paid to injured employee within six months from date of injury, claim for same within such time by employee is waived.

SAME—*furnishing medical aid not payment of compensation.* Payment for medical services and furnishing medical aid by employer to injured employee is not construed as payment of compensation.

SAME—*when award will be made.* Where claimant sustains accidental personal injuries, arising out of and in course of employment, while engaged in extra hazardous occupation, an award will be made for compensation for such injuries and the amount determined under provisions of Workmen's Compensation Act.

Mr. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

For about three months prior to September 26, 1931, the claimant, Robert W. Kennedy, was employed by the Division of Highways, Department of Public Works and Buildings, as a plant inspector, in connection with the construction of a hard-surfaced highway. On the last mentioned date he was working on S. B. I. Route No. 72, about one and one-half miles east of Stillman Valley. It was a part of his duties to check the weight of certain sacks and split sacks of cement and see that they were accurately weighed. In removing a small shovelful of cement from one sack in order that it might contain the correct weight, a quantity of dry cement got into his eyes, thereby causing him considerable pain. Medical and hospital attention were promptly furnished by the State, and the claimant was removed to the office of Dr. Thiell of Rockford, Illinois and thereafter to the Rockford City Hospital in that city. Dr. Thiell continued to treat him for some time thereafter, and subsequently testified that the temporary total disability ceased on March 14th, 1932. From the evidence it appears that the vision of the left eye is now normal, but that as a result of the accident in question, there is a loss of seventy-five per cent (75%) of the sight of the right eye.

Claimant's salary at the time of the accident in question was One Hundred Twenty-five Dollars ($125.00) per month, and it was stipulated that the Division of Highways employs inspectors regularly, full time, throughout the year at a rate of wage of at least One Hundred Twenty-five Dollars ($125.00) per month.

The construction of hard-surfaced roads constitutes "the erection of a structure" within the meaning of those words as used in Section three (3) of the Workmen's Compensation Act of this State. (*City of Rock Island* vs. *Industrial Commission*, 287 Ill. 76.) The work on which the claimant was engaged was in fact extra-hazardous, and he is therefore entitled to compensation, provided he has brought himself within the terms and provisions of the Workmen's Compensation Act.

The Attorney General has filed a motion to dismiss the case for the reason that claimant failed to make claim for

compensation within six months after the accident, and failed to file application for compensation within one year after the date of the injury or within one year after the date of the last payment of compensation.

Counsel for claimant contends that the furnishing of medical aid and the payment for medical services constitutes payment of compensation under the terms and provisions of the Compensation Act, and cites the cases of *New Staunton Coal Co.* vs. *Industrial Commission,* 328 Ill. 89; *Donk Bros. Coal Co.* vs *Industrial Commission,* 325 Ill. 193; and *Imbs Milling Co.* vs. *Industrial Commission,* 324 Ill. 416. All of such cases, however, were decided prior to the enactment of the present Paragraph A Section eight (8) of the Compensation Act which specifically provides that the furnishing of any such services by the employer shall not be construed as the payment of compensation.

In Angerstein's "The Employer and the Workmen's Compensation Act of Illinois," 1930 edition, page 925, Section 591, the author states:

"Where there has been a failure to make claim for compensation within six months after the accident so that the employer would have a defense to any proceedings for compensation, a payment of compensation after the expiration of that time would constitute a waiver. See *Tribune Co.* vs. *Industrial Com.*, 290 Ill. 402. Clearly a payment of compensation within the six-month period would also constitute a waiver of the right to a claim for compensation within the six months' time but in either event application for compensation would be required within one year after the last payment."

The evidence discloses that claimant was paid compensation in the amount of Three Hundred Seventy-five Dollars ($375.00). Such payment at the rate which claimant was entitled to receive, to-wit, Fourteen Dollars and Forty-two Cents ($14.42) per week, paid his compensation from the day after the accident to March 27th, 1932. The record shows that the declaration herein was filed in this Court on February 14th, 1933.

It appears, therefore, that payment of compensation was made within six months after the date of the injury and the declaration was filed within one year from the date to which compensation had been paid.

We conclude that under the evidence in this case, the necessity of making claim for compensation by the claimant

within six months after the date of the injury, was waived by payment of compensation by the respondent within that time.

The motion of the Attorney General to dismiss is therefore overruled and denied.

The Attorney General having submitted the case for hearing on the record, and having failed to plead, it will be considered under the rules of this court that a general traverse of the declaration has been filed.

From the record in this case it appears that the claimant is entitled to compensation for 114-1/7 weeks at the rate of Fourteen Dollars and Forty-two Cents ($14.42) per week; being 24-1/7 weeks' temporary total disability, to-wit, from September 27th, 1931 to March 14th, 1932; and ninety (90) weeks specific loss, for the loss of seventy-five per cent (75%) of the vision of the right eye.

After commuting the amount of compensation to which the claimant is entitled, to an equivalent lump sum in accordance with the provisions of section nine (9) of the Compensation Act, and deducting the compensation heretofore paid him, to-wit, the sum of Three Hundred Seventy-five Dollars ($375.00), we find the claimant is entitled to an award in the amount of Twelve Hundred Sixty-nine Dollars and Fifty-four Cents ($1,269.54).

IT IS THEREFORE ORDERED, That an award be entered in favor of the claimant for the sum of Twelve Hundred Sixty-nine Dollars and Fifty-four Cents ($1,269.54).

(No. 2093—Claimant awarded $11,458.35.)

300 WEST ADAMS STREET BUILDING CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1933.

HARRY A. KAHN, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

LANDLORD AND TENANT—*lease—holding over—rent.* **Where the evidence shows that State department executed lease for definite term and continued in possession of leased premises after expiration thereof, without any new agreement, a new lease for a period of one year will be created by operation of law on same conditions as in original lease and an award will be made for any rent due thereunder.**

SAME—*notice*. Where lease is for definite term no notice of intention to terminate same at expiration is necessary.

SAME—*when void*. Where statute gives power to State department to make leases for a term not exceeding two years, a lease made for a longer term is void.

Mr. JUSTICE LANSCOTT delivered the opinion of the court:

The plaintiff, 300 West Adams Street, Building Corporation is in Illinois Corporation, and filed its declaration on March 24, 1933, alleging that on the 18th day of April, 1927, it entered into a lease with the State of Illinois for thirteen thousand square feet on the second floor and two thousand square feet in the basement of premises known as 300 West Adams Street, Chicago, Cook County, Illinois, for the use of the Industrial Commission. The lease was to commence on the first day of May, 1927, and expire on the 30th day of April, 1929, with an optional clause on the part of the lessee, the Industrial Commission of Illinois, to renew this lease for two additional periods of two years each, at the same rental, terms and conditions as provided in the lease, a copy of which lease was marked "Exhibit A", attached to the declaration and made a part thereof. The term rental for the two year period was fixed at Fifty-five Thousand Dollars ($55,000.00), and was payable in twenty-four (24) monthly installments of Two Thousand One Hundred Sixty-six Dollars and Sixty-seven Cents ($2,166.67) per month for a space on the second floor and One Hundred Twenty-five Dollars ($125.00) per month for space in the basement.

The declaration avers that on the 1st day of November, 1928, the Industrial Commission of Illinois, by William M. Scanlan, as Chairman, notified the president of plaintiff that it had elected to renew the lease then in effect for an additional period of two years from the 18th day of April, 1929. Plaintiff avers that after the making of the lease, the Industrial Commission of Illinois took possession and occupied the premises, in accordance with the terms and provisions of the lease, and averred that the lease had been renewed for a two year period from the 18th day of April, 1929, but that the Industrial Commission of Illinois has not kept its promise and now owes the plaintiff, the sum of Thirty-eight Thousand Nine Hundred Fifty-eight Dollars and Thirty-nine Cents ($38,958.39).

It is agreed that there was a lease dated April 18, 1927, which covered a period of two years from May 1, 1927 to and including April 30, 1929, of premises used as officers by the Industrial Commission, and rent was paid from May 1, 1927, to December 3, 1929.

It appears from the facts that the State of Illinois did pay for the full time that the Industrial Commission occupied the premises, in accordance with the terms of the lease. The plaintiff insists that the State should pay for the full period of two years, being the time that the lease was renewed by William M. Scanlan, Chairman of the Industrial Commission.

Nowhere in the evidence does it appear that a confirmation of this renewal was ever made, either by the Director of the Department of Finance or the Director of the Department of Labor.

On December 3, 1929, the premises were vacated by the Commission, at the suggestion of Clarence S. Piggott, a successor to Scanlan, and on or about November 1, 1929, a lease of new quarters in the Engineer's Building in Chicago was made, and the Commission moved to the new quarters on December 3, 1929, surrendering possession of the premises at 300 West Adams Street.

No documentary evidence was available on behalf of the State in this case. A stipulation of the material facts has been made. The plaintiff sets forth its case in three propositions:

(1) The renewal of the option in the original lease by Chairman Scanlan of the Industrial Commission operated in view of all the facts and circumstances as a renewal of the lease for an additional two years period from May 1, 1929 to April 30, 1931.

(2) If such option was not legally exercised so as to bind the State, then a lease for one year from May 1, 1929, to April 30, 1930, was created by operation of law by the holding over by respondent and the payment and acceptance of monthly rent.

(3) That if a lease for one year was created by operation of law, the claimant having received no statutory notice of sixty days to terminate said lease, the respondent is liable for sixty days additional rent covering the period from May 1, 1930 to July 1, 1930.

It is a familiar principle of law that one dealing with an agent is bound to know such agent's authority.

Section 13 of Paragraph 36, Chapter 127, Smith-Hurd's Illinois Revised Statutes of 1931, gives power to the Department of Finance to make such leases in the following language: "To lease for a term not exceeding two years, office space in buildings for the use of the several departments:"

We therefore hold that the action of Chairman Scanlan was without authority and a renewal of the original lease for a period of two years was void.

We regard the second proposition as stating a legal proposition and hold that a new lease for a period of one year from May 1, 1929, to and including April 30, 1929, was created by operation of law. Claimant therefore would be entitled to rent of $2,216.67 per month for the months of December, 1929; January, February, March and April, 1930, the same being the months the State had not occupied the premises nor paid rent therefor, or a total of $11,458.35.

The courts have repeatedly held that where a tenant for years, or a year, holds over after the term fixed in the original lease has expired, without any new agreement, the landlord at his election, may treat such tenant as a trespasser, or as a tenant for another year upon the same terms and conditions set forth in the original lease.

Clinton Wire Cloth Co. vs. *Gardner*, 99 Ill. 151.
Condon vs. *Brockway*, 157 Ill. 90.
Streit vs. *Fay*, 230 Ill. 319.

It is contended by the claimant that no statutory sixty day notice was ever given by the respondent, the State is liable for sixty days' additional rent beyond the year of the lease created by law.

From the stipulation on file, it appears that the Industrial Commission surrendered possession to the plaintiff five months prior to the expiration of the year lease created by law, and that the owner of the premises had posted rent signs and had attempted to rent the premises immediately following surrender by the tenant.

It also appears that the plaintiff had protested to the Industrial Commission when the Commission decided to change its location.

We take the view that inasmuch as the owner of the premises had at least five months' notice of the abandonment of the premises, that the proposed object of the statute requiring sixty days' notice has been complied with. Just as a lease may arise by operation of law, so may the termination of a tenancy be implied from the acts of the landlord and tenant. The landlord has not been hurt by failure on the part of the Commission to give the usual statutory notice. The law created a tenancy for another year after the expiration of the two year period because the Industrial Commission held over the original lease. This lease for one year, by operation of law, is for a time definite and certain and it is unnecessary to give the usual notice to terminate the lease.

We, therefore, hold that the plaintiff is entitled to the sum of $11,458.35 in full settlement of its claim and we recommend that the appropriation be made for that sum.

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